CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 38 OCTOBER 20, 2004 NO. 43

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

(CBP Dec. 04–34)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR SEPTEMBER, 2004

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): September 6, 2004

European Union euro:

September 1, 2004	$1.217900
September 2, 2004	1.216400
September 3, 2004	1.205200
September 4, 2004	1.205200
September 5, 2004	1.205200
September 6, 2004	1.205200
September 7, 2004	1.209300
September 8, 2004	1.216400
September 9, 2004	1.218900
September 10, 2004	1.228200
September 11, 2004	1.228200
September 12, 2004	1.228200
September 13, 2004	1.225100
September 14, 2004	1.226800
September 15, 2004	1.214400
September 16, 2004	1.215400
September 17, 2004	1.217400
September 18, 2004	1.217400
September 19, 2004	1.217400
September 20, 2004	1.217200
September 21, 2004	1.226400
September 22, 2004	1.226100
September 23, 2004	1.229800
September 24, 2004	1.225600
September 25, 2004	1.225600
September 26, 2004	1.225600
September 27, 2004	1.230700
September 28, 2004	1.230600

FOREIGN CURRENCIES—Daily rates for Countries not on quarterly list for September 2004 (continued):

European Union euro: (continued):

September 29, 2004	1.230800
September 30, 2004	1.241700

South Korea won:

September 1, 2004	$0.000870
September 2, 2004	0.000869
September 3, 2004	0.000869
September 4, 2004	0.000869
September 5, 2004	0.000869
September 6, 2004	0.000869
September 7, 2004	0.000869
September 8, 2004	0.000870
September 9, 2004	0.000873
September 10, 2004	0.000873
September 11, 2004	0.000873
September 12, 2004	0.000873
September 13, 2004	0.000873
September 14, 2004	0.000873
September 15, 2004	0.000871
September 16, 2004	0.000873
September 17, 2004	0.000872
September 18, 2004	0.000872
September 19, 2004	0.000872
September 20, 2004	0.000872
September 21, 2004	0.000872
September 22, 2004	0.000871
September 23, 2004	0.000871
September 24, 2004	0.000870
September 25, 2004	0.000870
September 26, 2004	0.000870
September 27, 2004	0.000870
September 28, 2004	0.000866
September 29, 2004	0.000867
September 30, 2004	0.000868

Taiwan N.T. dollar

September 1, 2004	$0.029525
September 2, 2004	0.029551
September 3, 2004	0.029577
September 4, 2004	0.029577
September 5, 2004	0.029577
September 6, 2004	0.029577
September 7, 2004	0.029455
September 8, 2004	0.029499
September 9, 2004	0.029568
September 10, 2004	0.029472
September 11, 2004	0.029472
September 12, 2004	0.029472
September 13, 2004	0.029481
September 14, 2004	0.029520

FOREIGN CURRENCIES—Daily rates for Countries not on quarterly list for September 2004 (continued):

Taiwan N.T. dollar (continued):

September 15, 2004	0.029621
September 16, 2004	0.029682
September 17, 2004	0.029520
September 18, 2004	0.029520
September 19, 2004	0.029520
September 20, 2004	0.029490
September 21, 2004	0.029472
September 22, 2004	0.029586
September 23, 2004	0.029542
September 24, 2004	0.029516
September 25, 2004	0.029516
September 26, 2004	0.029516
September 27, 2004	0.029412
September 28, 2004	0.029326
September 29, 2004	0.029369
September 30, 2004	0.029420

Dated: October 1, 2004

Richard B. Laman for MARGARET T. BLOM,
Acting Chief,
Customs Information Exchange.

(CBP Dec. 04–35)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR SEPTEMBER, 2004

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in CBP Decision 04–32 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): September 6, 2004

Brazil real:

September 1, 2004	$0.341530
September 3, 2004	0.341472
September 4, 2004	0.341472
September 5, 2004	0.341472
September 6, 2004	0.341472

FOREIGN CURRENCIES—Variances from quarterly rates for September 2004 (continued):

Brazil real (continued):

September 7, 2004	0.343407
September 8, 2004	0.344590
September 9, 2004	0.343997
September 10, 2004	0.344590
September 11, 2004	0.344590
September 12, 2004	0.344590
September 13, 2004	0.343997
September 14, 2004	0.343053
September 15, 2004	0.343938
September 16, 2004	0.345901
September 17, 2004	0.347766
September 18, 2004	0.347766
September 19, 2004	0.347766
September 20, 2004	0.349162
September 21, 2004	0.347766
September 22, 2004	0.348311
September 23, 2004	0.348129
September 24, 2004	0.348797
September 25, 2004	0.348797
September 26, 2004	0.348797
September 27, 2004	0.348189
September 28, 2004	0.349040
September 29, 2004	0.350140
September 30, 2004	0.349162

Canada dollar:

September 30, 2004	$0.790639

New Zealand dollar:

September 30, 2004	$0.675500

South Africa rand:

September 1, 2004	$0.151057
September 2, 2004	0.152207
September 3, 2004	0.150204
September 4, 2004	0.150204
September 5, 2004	0.150204
September 6, 2004	0.150204
September 7, 2004	0.150602
September 8, 2004	0.150523
September 9, 2004	0.149701
September 10, 2004	0.151976
September 11, 2004	0.151976
September 12, 2004	0.151976
September 15, 2004	0.151976
September 16, 2004	0.151895
September 17, 2004	0.152439

FOREIGN CURRENCIES—Variances from quarterly rates for September 2004 (continued):

South Africa rand: (continued):

September 18, 2004	0.152439
September 19, 2004	0.152439

Dated: October 1, 2004

Richard B. Laman for MARGARET T. BLOM,
Acting Chief,
Customs Information Exchange.

10/1/04

CIE C 42/03
LIQ–03–01–RR:OO:CI

RE: SECTION 159.34 CFR

SUBJECT: CERTIFIED RATES OF FOREIGN EXCHANGE: FOURTH QUARTER, 2004

LISTED BELOW ARE THE BUYING RATES CERTIFIED FOR THE QUARTER TO THE SECRETARY OF THE TREASURY BY THE FEDERAL RESERVE BANK OF NEW YORK UNDER PROVISION OF 31 USC 5151. THESE QUARTERLY RATES ARE APPLICABLE THROUGHOUT THE QUARTER EXCEPT WHEN THE CERTIFIED DAILY RATES VARY BY 5% OR MORE. SUCH VARIANCES MAY BE OBTAINED BY CALLING (646) 733–3065 OR (646)733–3057.

QUARTER BEGINNING OCTOBER 1, 2004 AND ENDING DECEMBER 31, 2004

COUNTRY	CURRENCY	U.S. DOLLARS
AUSTRALIA	DOLLAR	$0.723200
BRAZIL	REAL	$0.352113
CANADA	DOLLAR	$0.791828
CHINA, P.R.	YUAN	$0.120823
DENMARK	KRONE	$0.166639
HONG KONG	DOLLAR	$0.128253
INDIA	RUPEE	$0.021810
JAPAN	YEN	$0.009054
MALAYSIA	RINGGIT	$0.263158
MEXICO	NEW PESO	$0.088160
NEW ZEALAND	DOLLAR	$0.673300
NORWAY	KRONE	$0.149432
SINGAPORE	DOLLAR	$0.594778

COUNTRY	CURRENCY	U.S. DOLLARS
SOUTH AFRICA	RAND	$0.154381
SRI LANKA	RUPEE	$0.009657
SWEDEN	KRONA	$0.137457
SWITZERLAND	FRANC	$0.800256
THAILAND	BAHT	$0.024178
UNITED KINGDOM	POUND STERLING	$1.797600
VENEZUELA	BOLIVAR	$0.000521

Richard B. Laman for MARGARET T. BLOM,
Acting Chief,
Customs Information Exchange.

19 CFR PART 191

[CBP Dec. 04 – 33]

RIN 1505–AB44

MERCHANDISE PROCESSING FEES ELIGIBLE TO BE CLAIMED AS CERTAIN TYPES OF DRAWBACK BASED ON SUBSTITUTION OF FINISHED PETROLEUM DERIVATIVES

AGENCY: Customs and Border Protection, Homeland Security; Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs and Border Protection (CBP) Regulations to provide that merchandise processing fees are eligible to be claimed, in limited circumstances, as drawback based on substitution of finished petroleum derivatives. The changes implemented by this document are consistent with a court decision in which merchandise processing fees were found to be eligible to be claimed as unused merchandise drawback. As drawback based on substitution of finished petroleum derivatives is, in limited circumstances, treated in the same manner as unused merchandise drawback, this amendment reflects that merchandise processing fees are also eligible to be claimed as drawback in these circumstances.

EFFECTIVE DATE: November 8, 2004.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Chief, Duty and Refund Determinations Branch, Office of Regulations and Rulings, U.S. Customs Service, Tel. (202) 572–8807.

SUPPLEMENTARY INFORMATION:

Background

Merchandise Processing Fees

Merchandise processing fees are fees the Secretary of the Treasury charges and collects for the processing of merchandise that is formally entered or released into the United States. See 19 U.S.C. 58c(a)(9)(A). Merchandise processing fees are assessed as a percentage of the value of the imported merchandise, as determined under 19 U.S.C. 1401a.

Merchandise Processing Fees Eligible to be Claimed as Drawback

Section 313 of the Tariff Act of 1930, as amended, (19 U.S.C. 1313), concerns drawback and refunds. Drawback is a refund of certain duties, taxes and fees paid by the importer of record and granted to a drawback claimant under specific conditions.

In Texport Oil v. United States, 185 F.3d 1291 (Fed. Cir. 1999), the Court of Appeals for the Federal Circuit (CAFC) held that merchandise processing fees were assessed under Federal law and imposed by reason of importation and therefore eligible to be claimed as unused merchandise drawback pursuant to 19 U.S.C. 1313(j).

Subsection (p) of 19 U.S.C. 1313 authorizes drawback that is based on "substitution of finished petroleum derivatives." Subsection (p)(4)(B) of 19 U.S.C. 1313, in pertinent part, limits the amount of drawback payable under this subsection to the amount of drawback that would be attributable to the article "if imported under [subsection 1313(p)(2)(A)(iii) or (iv)] had the claim qualified for drawback under subsection (j)." [emphasis added]

Subsection 1313(p)(2)(A)(iii) requires that the exporter of the exported article imported the qualified article in a quantity equal to or greater than the quantity of the exported article. Subsection 1313(p)(2)(A)(iv) requires that the exporter of the exported article purchased or exchanged, directly or indirectly, an imported qualified article from an importer in a quantity equal to or greater than the quantity of the exported article.

The language "had the claim qualified for drawback under subsection (j)" reflects that drawback is payable under 1313(p)(2)(A)(iii) or (iv) pursuant to the same formula set forth in subsection 1313(j), i.e., the amount of drawback payable under 19 U.S.C. 1313(j) is not to exceed 99 percent of any duty, tax, or fee imposed under Federal law because of the imported article's importation. The term "drawback payable" under 19 U.S.C. 1313(p)(2)(A)(iii) and (iv) includes the merchandise processing fee.

Consistent with the determination of the CAFC that merchandise processing fees are eligible to be claimed as drawback pursuant to 19 U.S.C. 1313(j), such fees are also eligible to be claimed as drawback

when drawback is based on substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv).

Amendment to CBP Regulations to Reflect the Texport Oil Decision

The Texport Oil decision is reflected in the CBP Regulations at §§ 191.3 and 191.51. See 67 FR 48547 (July 25, 2002), in which a final rule was published amending the CBP Regulations to reflect that merchandise processing fees are eligible to be claimed as unused merchandise drawback pursuant to 19 U.S.C. 1313(j).

On October 2, 2003, CBP published in the **Federal Register** (68 FR 56804) a proposal to amend §§ 191.3, 191.51 and 191.171 to reflect that the Texport Oil decision is applicable, in limited circumstances, to drawback based on substitution of finished petroleum derivatives.

Comments were solicited on the proposal.

DISCUSSION OF COMMENT

One comment was received in response to the solicitation of public comment in 68 FR 56804. The commenter supported CBP's proposal to reflect the Texport Oil court decision in part 191 of the CBP Regulations as regards drawback based on substitution of finished petroleum derivatives. The commenter noted that the proposed amendments contribute to the goal of offsetting the cost of raw materials.

CONCLUSION

After review of the one comment received, and upon consideration, CBP has decided to adopt as final the proposed rule published in the **Federal Register** (68 FR 56804) on October 2, 2003.

THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Because these regulations serve to conform the CBP Regulations to reflect the full scope of a recent decision by the Court of Appeals for the Federal Circuit whereby, in limited circumstances, merchandise processing fees are eligible to be claimed as drawback, it is certified pursuant to the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. that this amendment will not have a significant impact on a substantial number of small entities. Further, this amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

SIGNING AUTHORITY

This document is being issued in accordance with 19 CFR 0.1(a)(1).

DRAFTING INFORMATION

The principal author of this document was Ms. Suzanne Kingsbury, Regulations Branch, Office of Regulations and Rulings, U.S. Customs and Border Protection. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 191

Claims, Commerce, CBP duties and inspection, Drawback.

AMENDMENTS TO THE REGULATIONS

For the reasons stated above, part 191 of the CBP Regulations (19 CFR part 191) is amended as follows:

PART 191 - DRAWBACK

1. The general authority citation for part 191 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1313, 1624.

2. Section 191.3(a)(4) and (b)(2) are revised as follows:

§ 191.3 Duties and fees subject or not subject to drawback.

(a) Duties and fees subject to drawback include:

* * *

(4) Merchandise processing fees (see § 24.23 of this chapter) for unused merchandise drawback pursuant to 19 U.S.C. 1313(j), and drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv).

(b)

* * *

(2) Merchandise processing fees (see § 24.23 of this chapter), except where unused merchandise drawback pursuant to 19 U.S.C. 1313(j) or drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv) is claimed; and

* * * * *

3. In § 191.51, paragraph (b)(2) introductory text is revised to read as follows:

§ 191.51 Completion of drawback claims.

* * * * *

(b)

* * *

(2) <u>Merchandise processing fee apportionment calculation</u>. Where a drawback claimant seeks unused merchandise drawback

pursuant to 19 U.S.C. 1313(j), or drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv), for a merchandise processing fee paid pursuant to 19 U.S.C. 58c(a)(9)(A), the claimant is required to correctly apportion the fee to that merchandise that provides the basis for drawback when calculating the amount of drawback requested on the drawback entry. This is determined as follows:

* * * * *

4. In § 191.171, a new paragraph (c) is added to read as follows:

§ 191.171 General; Drawback allowance.

* * * * *

(c) Merchandise processing fees. In cases where the requirements of paragraph (b)(1) of this section have been met, merchandise processing fees will be eligible for drawback.

ROBERT C. BONNER,
Commissioner,
U.S. Customs and Border Protection.

Approved: October 4, 2004

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 7, 2004 (69 FR 60082)]

Bureau of Customs and Border Protection

General Notices

19 CFR 133

RIN 1505–AB51

RECORDATION OF COPYRIGHTS AND ENFORCEMENT PROCEDURES TO PREVENT THE IMPORTATION OF PIRATICAL ARTICLES

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed rule.

SUMMARY: As a result of technological advances available to those pirating copyrighted works, there has been a global increase in the importation of piratical works. Because of this increased risk to owners of protected copyrighted works and because most owners of copyrights in non-U.S. works do not register their copyrights as a matter of course, the Bureau of Customs and Border Protection (CBP) is proposing regulations that allow CBP to be more responsive to claims of piracy.

The CBP Regulations currently require that in order to be eligible for border protection all claims to copyright, foreign and domestic, be registered with the U.S. Copyright Office. This document proposes to allow sound recordings and motion pictures or similar audio-visual works to be recorded with CBP while pending registration with the U.S. Copyright Office. This document also proposes to amend the CBP Regulations to enhance the protection of all non-U.S. works by allowing recordation without requiring registration with the U.S. Copyright Office. Lastly, the proposed regulations set forth changes to CBP's enforcement procedures, including, among other things, enhanced disclosure provisions, protection for live musical performances and provisions to enforce the Digital Millennium Copyright Act.

DATES: Written comments must be submitted on or before November 4, 2004.

ADDRESSES: You may submit comments, identified by RIN 1505–AB51, by either of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- Mail: Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW. (Mint Annex), Washington, DC 20229.

Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Paul Pizzeck, Esq. or George F. McCray, Esq., Intellectual Property Rights Branch, Office of Regulations and Rulings, 202–572–8710.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Due to a global increase in piracy and an increased risk to owners of protected copyrighted works as a result of technological advances available to those pirating such works, the Bureau of Customs and Border Protection (CBP) is proposing regulations that allow CBP to be more responsive to claims of piracy. In this document, CBP is proposing changes designed to better facilitate the recordation process with CBP for certain works and to strengthen the enforcement procedures to protect those rights.

Recordation of Protected Copyrighted Works

CBP is proposing several changes to subpart D of part 133 of the CBP Regulations regarding the recordation process, as set forth below.

<u>Protection of Sound Recordings and Motion Pictures or Similar Audio-Visual Works Pending Registration With the U.S. Copyright Office</u>

Presently, the CBP Regulations provide that only those claims to copyright, foreign and domestic, which have been registered with the U.S. Copyright Office may be recorded with CBP. Subparts D and E of part 133, CBP Regulations (19 CFR part 133, subparts D and E) prohibit the importation of piratical works that have been properly registered and recorded. However, piratical copies of sound recordings and motion pictures or similar audio-visual works are often found in the market before the owner of a copyright in those works can effect registration of the copyright with the U.S. Copyright Office. Although the copyrightability of these types of works is rarely a substantive issue, because of the time lapse between the application

for registration and the granting of registration with the U.S. Copyright Office, significant imports of piratical articles can often occur before the copyright owner is able to secure registration with the U.S. Copyright Office.

For these types of works, it is during the periods of time prior to and immediately following the release of the work in which piracy is most likely to occur. As a result, pre-release copyright registration applications are generally avoided due to concerns about leaks arising from the sample copies submitted with the application which are made available to the public.

Securing border protection simultaneously with (or in some cases prior to) the commercial release of sound recordings and motion pictures or similar audio-visual works should help to prevent the importation into the U.S. of piratical goods. As a result, CBP is proposing to revise subparts D and E of part 133, CBP Regulations, in order to provide for border enforcement of U.S. copyrights for sound recordings and motion pictures or similar audio-visual works in which copyrightability is rarely a substantive issue, that are pending registration with the U.S. Copyright Office.

Concerning sound recordings and motion pictures or similar audio-visual works, CBP intends to accept a copy of a valid application for registration that has been filed with the U.S. Copyright Office as evidence of a copyrightable interest entitled to protection by CBP. The proposed regulations require that an applicant provide to CBP proof of registration with the U.S. Copyright Office no later than six months after the date of the application for recordation. If the applicant fails to provide proof of registration in a timely manner, CBP would cancel the related recordation. In addition, CBP proposes to reserve the right to cancel any recordation which it determines to have been obtained in any manner contrary to law. Permitting copyright owners of those certain categories of works, for which copyrightability is rarely a substantive issue, to make an initial recordation with CBP based on a filed, pending application for copyright registration rather than a perfected certificate of registration, will allow CBP to prevent the importation of piratical goods prior to the completion of the registration process.

Accordingly, in § 133.32 which covers the recordation procedure for protected copyrighted works, a new paragraph (b)(4) is proposed to include claims to copyright in sound recordings and motion pictures or similar audio-visual works which are not yet registered with the U.S. Copyright Office.

CBP notes that the above proposed change may result in an increased number of applications for recordation and, as each application is required to be accompanied by a $190 fee, an increased administrative burden in the processing of an increased number of individual payments. In order to mitigate processing costs for business and government, we are considering allowing alternative fee ar-

rangements. For example, one annual payment may be made in lieu of individual application fees. The difference between the amount paid per recordation under the alternative arrangement and the standard single recordation fee (currently, $190) would not exceed the difference in processing costs. We are particularly interested in any comments on the fairness, equity, and potential administrative efficiency of such arrangements under 31 USC 9701.

Non-U.S. Works Entitled to Border Enforcement Protection

Under the current regulations, in order to seek protection from the importation of piratical copies, non-U.S. claimants holding a copyright entitled to enforcement are required to provide CBP with a valid certificate of registration issued by the U.S. Copyright Office and to record such registration with CBP. However, because most countries do not have registration systems and most non-U.S. copyright claimants do not register their works in the U.S. as a matter of course, and at the same time, due to technological advances available for pirating such works, there is an overall global increase in piracy and increased risk to owners of protected copyrighted works originating from throughout the world. Accordingly, CBP believes that it would be appropriate for non-U.S. claimants holding copyrights in such works to be entitled to record their claims with CBP regardless of whether they have registered their copyrights with the U.S. Copyright Office at the time of recordation.

Accordingly, in § 133.31(a) covering protected copyrighted works eligible for recordation, new regulatory text is proposed to include, among other things, certain claims to copyright in non-U.S. works that have not been registered with the U.S. Copyright Office, but which are recognized under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).

Recordation Application Process

Based on the above described changes, CBP is also proposing to amend § 133.32 of the CBP Regulations (19 CFR 133.32) which outlines the procedure for recordation and the information required in all applications to record a copyright with CBP. To carry out CBP protection of claims to copyright in certain U.S. works pending registration with the U.S. Copyright Office and claims to copyright in non-U.S. works which are entitled to protection under 17 U.S.C. 104, new paragraphs (b)(3) and (4) are proposed to be added to expand § 133.32 to provide for such claims.

New paragraph (b)(3) would permit owners of claims to copyrights in non-U.S. works to apply for recordation with CBP for the enforcement of such claims, even if not registered with the U.S. Copyright Office. This new paragraph sets forth that non-U.S. works will be entitled to border enforcement protection when sufficient evidence of ownership of copyright in those works is provided to CBP through recordation with CBP. Sufficient evidence of ownership consists of a

written affidavit (in English), appropriately sworn to by a duly authorized party, validating the existence, ownership, and nature of the rights claimed.

New paragraph (b)(4) would allow owners of claims to copyrights in U.S. sound recordings and motion pictures or similar audio-visual works, for which copyrightability is rarely a substantive issue, and for which securing border protection on an immediate basis is essential for purposes of preventing the importation of piratical articles, to record these works with CBP when registration is pending with the U.S. Copyright Office. The filing of such a claim will require the submission to CBP of a copy of a valid registration application officially filed with the U.S. Copyright Office for the specific work. Claims for protection made pursuant to either provision ((b)(3) or (4)) will be subject to independent verification by CBP, which will maintain sole discretion as to whether to accept such claims for enforcement.

In addition, to further clarify and simplify the recordation process and reduce the burden on those applying for recordation of claims to copyright, CBP is proposing other changes to §§ 133.32 and 133.33 which would: (1) allow a "duly appointed representative" to record a claim to copyright for the copyright owner thereby eliminating the need for the copyright owner to personally file the application; (2) eliminate the requirement that an applicant supply four additional photocopies (or likenesses) of the protected copyrighted work with the application; (3) update the address to which completed applications are submitted; and (4) update the name of the agency to which fees are submitted for recordation of copyright to reflect the new name of the former U.S. Customs Service.

CBP is also proposing to require information regarding the citizenship of a copyright owner. Moreover, the current regulation requires that photographic or other likenesses be provided with an application for recordation in order to ensure that CBP has adequate information regarding a claim to copyright to enforce such rights. Works such as books, magazines, periodicals and sound recordings are excepted from this requirement. CBP is proposing to require that, as appropriate, either a sample, a digital image, or photograph of the protected work be submitted with the application to record the copyright. CBP is further proposing to require samples of sound recordings.

Enforcing the Prohibition on the Importation of Piratical Articles

CBP is proposing several changes to subpart E of part 133 of the CBP Regulations to achieve consistency with the above proposed changes concerning subpart D of part 133. The proposed changes, as set forth below, also serve to strengthen CBP's ability to enforce the prohibition against the importation of piratical articles.

Definition of "Protected Copyrighted Works"

Section 133.42(a) currently provides that "Infringing copies or phonorecords are 'piratical' articles." In order to more accurately and completely define "piratical articles," CBP is proposing to revise paragraph (a) of § 133.42 to define "piratical articles" as those which constitute unlawful copies (made without the authorization of the copyright owner) or phonorecords of "protected copyrighted works." The proposed amended language defines "protected copyrighted works" to encompass works registered with the U.S. Copyright Office and recorded with CBP, non-U.S. works which are entitled to protection under 17 U.S.C. 104 (including sound recordings and motion pictures or similar audio-visual works) for which relevant ownership information is recorded with CBP, and certain U.S. works pending registration with the U.S. Copyright Office that are duly recorded with CBP.

Disclosure to Copyright Owners Upon Infringement

CBP has determined that, in order to pursue all avenues of relief from copyright infringement, including seeking criminal prosecution of violators and pursuing private civil remedies for copyright infringement, an affected copyright owner must have access to certain information regarding parties attempting to import infringing piratical articles. In cases involving seizures of articles that circumvent copyright protection systems (technological measures) under the Digital Millennium Copyright Act (Pub. L. 105–304, 112 Stat. 2860, DMCA) (see Other Proposed Changes to the Regulations below), such information would be provided to the producers, or their duly authorized agents, of such copyright protection systems. Accordingly, CBP is proposing to amend its disclosure provisions regarding copyright violations in order to expand the information provided to copyright owners, or, in the case of articles seized pursuant to 19 CFR 133.42(c)(3) information provided to duly authorized agents of producers of copyright protection systems (technical measures), when merchandise violating their rights is seized at the border including information regarding articles seized for violation of the DMCA.

Currently § 133.42(d) provides that, when CBP seizes goods under that section, CBP will disclose to the owner of the copyright:

(1) the date of importation;
(2) the port of entry;
(3) a description of the merchandise;
(4) the quantity involved;
(5) the name and address of the manufacturer;
(6) the country of origin of the merchandise;
(7) the name and address of the exporter; and
(8) the name and address of the importer.

CBP is proposing to amend § 133.42(d) to provide that, in addition to the information above, when CBP seizes goods under that section, CBP will also disclose to the copyright owner or, for merchandise

seized pursuant to § 133.42(c)(3), to the producer of the copyright protection system: (9) information from available shipping documents (such as manifests, air waybills, and bills of lading), including mode or method of shipping (such as airline carrier and flight number) and the intended final destination of the merchandise.

Procedures on the Suspicion of Piratical Copies

Section 133.43 contains the current procedures to be employed when CBP suspects that certain articles may be piratical articles. The current § 133.43 provides for: (1) notice of detention of suspected articles to an importer and to a copyright owner, including the disclosure of certain information; (2) the disclosure of samples of suspected articles to the copyright owner; (3) the release of the goods in the case of inaction by the copyright owner, and in cases where the copyright owner makes a written demand for the exclusion of the suspected articles, a bonding requirement and exchange of briefs process; and (4) alternative procedures to the administrative process (court action). In general, the current regulations provide that upon notification by a port director that CBP has reason to believe that an imported article may be a piratical copy or phonorecord of a copyrighted work, the copyright owner may file a written demand for exclusion of the suspected infringing copies. Additional evidence, legal briefs, and other pertinent material to substantiate a claim or denial of piracy are then exchanged between the parties and eventually submitted to CBP for administrative review.

CBP believes that the existing procedures contained in § 133.43 are an outdated and inefficient mechanism to address the situation where CBP has a suspicion that certain goods may be piratical. These provisions are rarely used and unduly burdensome on CBP and all other parties involved. Essentially, these procedures interfere with CBP's ability to conduct the required investigation in a timely and efficient manner. Moreover, the process inhibits CBP from applying its expertise in an expedient manner to determine whether or not merchandise is piratical. Most importantly, these procedures are ineffective in aiding CBP in resolving the issue of whether certain merchandise is indeed piratical.

Likewise, § 133.44 outlines the actions to be taken when a claim of piracy under § 133.43 is sustained or denied.

Accordingly, CBP is proposing to remove § 133.43 and § 133.44 in their entirety. Instead, CBP is proposing regulations allowing CBP to detain merchandise when CBP has reasonable suspicion to believe that the merchandise is piratical and to seize merchandise that it determines to be piratical. In addition, the proposed regulations would facilitate the exchange of information between the copyright owners and CBP in order to assist CBP in making this determination.

Detention of Sound Recordings and Motion Pictures or Similar Audio Visual Works

CBP is proposing to add regulatory text in a newly created paragraph (b)(2) to § 133.42 that specifies CBP's power to detain articles that appear to be piratical copies of sound recordings, motion pictures, or similar audio-visual works to conduct further investigation. Accordingly, paragraph (b)(2) in § 133.42 proposes to allow CBP to detain, for up to 30 days, sound recordings and motion pictures or similar audio-visual works prior to registration with the U.S. Copyright Office when CBP has reasonable suspicion to believe that they constitute piratical copies even though there is no underlying copyright registration or recordation on file with CBP. Reasonable suspicion that certain articles are piratical may be based upon factors such as poor product quality, substandard packaging, irregular invoicing, methods of shipment, or other indicia of piracy.

Waiver of Bond Requirement for Samples Less Than $50.00

Section 133.42(e) of the CBP Regulations (19 CFR 133.42(e)) allows CBP to provide a sample of suspect merchandise to the owner of the copyright. The copyright owner seeking to obtain a sample is required to furnish a bond to CBP. CBP is proposing to allow port directors, at their discretion, to waive the bond requirement where the value of the sample is less than $50.00.

Other Proposed Changes to the Regulations

Adding DMCA Violations to Enforcement Provisions of Subpart E

In 1998, Congress enacted the DMCA. Among other things, the DMCA prohibits the circumvention of technological measures used by copyright owners to protect their works. A technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

Although the current CBP Regulations do not specifically provide for detention and seizure of articles that constitute violations of the DMCA, CBP has implemented the DMCA by providing CBP personnel with internal enforcement guidelines and advice on how to enforce DMCA violations. Where CBP finds that certain devices violate the DMCA, the goods are subject to seizure and forfeiture under 19 U.S.C. 1595a(c)(2)(C) for a violation of the DMCA (17 U.S.C. 1201(b)(1)).

Accordingly, CBP is proposing to include provisions for the detention and seizure of articles that constitute violations under the DMCA to the enforcement provisions of subpart E. Specifically, CBP is proposing to add paragraph (b)(3) to § 133.42 to provide for the detention of articles that CBP reasonably believes constitute violations of 17 U.S.C. 1201(b)(1). Such detentions will be limited to 30

days in duration. In the event that the Intellectual Property Rights (IPR) Branch within CBP's Office of Regulations & Rulings determines that such detained articles violate 17 U.S.C. 1201(b)(1), CBP will then seize them and institute forfeiture proceedings in accordance with part 162 of chapter I of the CBP Regulations. Articles determined by the IPR Branch not to violate 17 U.S.C. 1201(b)(1), will be released.

CBP is also proposing to add paragraph (c)(3) to § 133.42 to provide for the seizure of articles that the IPR Branch determines to violate 17 U.S.C. 1201(b)(1). Importers may petition for relief from the seizure and forfeiture under the provisions of part 171 of chapter I. Articles that have been seized and forfeited to the U.S. Government under part 133 will be disposed of in accordance with § 133.52(b).

Adding Recordings of Live Musical Performances in Violation of 18 U.S.C. 2319A to Enforcement Provisions of Subpart E

Section 2319A of title 18 (18 U.S.C. 2319A) states that copies of live musical performance that are "fixed" outside of the U.S. without the consent of the performer or performers involved are subject to seizure and forfeiture in the same manner as property imported in violation of the customs laws. Although CBP has had enforcement guidelines in place for several years, CBP has not promulgated regulations implementing section 2319A.

Accordingly, CBP is proposing to add, at § 133.52(c)(2)(iii), recordings of live musical performances determined by CBP to be in violation of 18 U.S.C. 2319A to the types of sound recordings subject to seizure.

COMMENTS

Before adopting this proposed regulation as a final rule, consideration will be given to any written comments timely submitted to CBP, including comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 103.11(b), CBP Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), it is certified that these proposed amendments will not have a significant economic impact on a substantial number of small entities. The regulatory amendments reflect, implement, or clarify existing statutory and regulatory requirements created to protect the rights of legitimate copyright owners. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

SIGNING AUTHORITY

The authority to approve regulations concerning copyright enforcement, was retained by the Secretary of the Treasury. The signing authority for these amendments, therefore, falls under § 0.1(a)(1), CBP Regulations (19 CFR 0.1(a)(1)). Accordingly, this document is signed by the Secretary of Homeland Security (or his or her delegate) and the Secretary of the Treasury (or his or her delegate).

PAPERWORK REDUCTION ACT

The collection of information in this document is contained in § 133.32(b) of title 19 (19 CFR 133.32(b)). Under § 133.32(b), the information would be required and used to record copyrights with CBP for border enforcement protection of copyrights. The collection of this information would ensure that CBP has adequate information regarding a claim to copyright in order to protect the copyright owner's rights.

The collection of information encompassed within this proposed rule has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

Estimated annual reporting and/or recordkeeping burden: 4,000 hours.

Estimated average annual burden per respondent/recordkeeper: 2 hours.

Estimated number of respondents and/or recordkeepers: 2,000.

Estimated annual frequency of responses: 1.

Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer of the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW.

(Mint Annex), Washington, DC 20229. Comments should be submitted within the time frame that comments are due regarding the substance of the proposal.

Comments are invited on: (a) whether the collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or startup costs and costs of operations, maintenance, and purchases of services to provides information.

Part 178, CBP Regulations (19 CFR part 178), containing the list of approved information collections, would be revised to add an appropriate reference to 133.32(b), upon adoption of the proposal as a final rule.

LIST OF SUBJECTS IN 19 CFR PART 133

Copying or simulating trademarks, Copyrights, Counterfeit trademarks, Customs duties and inspection, Detentions, Fees assessment, Imports, Labeling, Penalties, Piratical articles, Prohibited merchandise, Reporting and recordkeeping requirements, Restricted merchandise, Seizures and forfeitures, Trademarks.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend part 133 of the Customs and Border Protection Regulations (19 CFR part 133), as discussed above and set forth below. For the reasons stated in the preamble, part 133 of the CBP Regulations (19 CFR part 133) is proposed to be amended to read as follows:

PART 133 – TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. The general authority citation for part 133 and the specific citation for § 133.42 is revised to read as follows:

AUTHORITY: 15 U.S.C. 1124, 1125; 17 U.S.C. 101, 106, 501, 601, 602, 603; 19 U.S.C. 66, 1499, 1595a, 1526, 1624; 31 U.S.C. 9701.

* * * * *

Section 133.42 also issued under 17 U.S.C. 1201(b), 18 U.S.C. 2319A.

* * * * *

2. The heading to subpart D is revised to read as follows:

Subpart D – Recordation of Protected Copyrighted Works

3. Section 133.31 is revised to read as follows:

§ 133.31 Recordation of protected copyrighted works.

(a) Eligible works. The following works, collectively referred to in this part as "protected copyrighted works", when properly recorded with the Bureau of Customs and Border Protection (CBP) in accordance with the provisions of § 133.32, are eligible for border enforcement by CBP in accordance with the provisions of § 133.42:

(1) Non-expired claims to copyright in U.S. works which are registered with the U.S. Copyright Office and recorded with CBP;

(2) Claims to copyright in non-U.S. works entitled to protection under 17 U.S.C. 104 which are recorded with CBP; and

(3) Claims to copyright in sound recordings and motion pictures or similar audio-visual works eligible for recordation under the provisions of § 133.32.

(b) Persons eligible to record. The owner of a copyright registered with the U.S. Copyright Office, including any person who has acquired copyright ownership through an exclusive license, assignment, or otherwise, who has registered that ownership interest with the U.S. Copyright Office, or their duly appointed representative may file an application to record that registered copyright. In addition, claimants to copyright in non-US works protected under 17 U.S.C. 104 and claimants to copyright in sound recordings and motion pictures or similar audio-visual works may also file an alternative application to record such claims in accordance with the provisions of § 133.32 of this subpart. The term "copyright owner," with respect to any of the exclusive rights comprised in a copyright (see 17 U.S.C. 106), refers to the owner of a particular right protected under title 17.

(c) Notice of recordation and other action. Applicants will be notified of the approval or denial of an application filed in accordance with § 133.32 upon completion of review.

4. Section 133.32 is revised to read as follows:

§ 133.32 Procedure for recording protected copyrighted works.

(a) Address. Applications to record protected copyrighted works under this section must be submitted in writing, addressed to the Intellectual Property Rights Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

(b) Contents; format.

(1) All recordation applications must include the following information (an electronic copyright recordation template can be found at the CBP website (www.cbp.gov)):

(i) The name, complete business address, and citizenship of the copyright owner (or owners) or claimants to copyright for pro-

tected works (if a partnership, the citizenship of each partner; if an association or corporation, the state, country, or other political jurisdiction within which it was organized, incorporated, or created);

(ii) A complete description of the rights asserted which adequately identifies the work including, as appropriate, either: a sample of the article(s) containing the claimed protected work; a digital image of same; or a photograph of same reproduced on paper no larger than 8 1/2″ × 11″ in size (an application will be excepted from this requirement if the subject matter is a work such as a book, magazine, periodical, or similar copyrighted matter readily identifiable by title and author);

(iii) The foreign title of the work, if different from the U.S. title;

(iv) In the case of copyright in a sound recording, a statement setting forth the name(s) of the performing artist(s), and any other information identifying the content thereof appearing on the reproduction surface of the sound recording, or its label or container; and

(v) The place(s) of manufacture of genuine copyrighted articles and the identity of the manufacturer(s).

(2) For claims to copyright in U.S. works which have been registered with the U.S. Copyright Office, recordation applications must also contain an additional certificate of registration issued by the U.S. Copyright Office. Where the name of the applicant differs from the name of the copyright owner identified in the registration certificate issued by the U.S. Copyright Office, the application must be accompanied by a certified copy of any assignment, exclusive license, or other document showing that the applicant has acquired an ownership interest in the copyright.

(3) For claims to copyright in non-U.S. works, including sound recordings and motion pictures or similar audio-visual works, entitled to protection under 17 U.S.C. 104, recordation applications must also contain a written affidavit (in English), appropriately sworn to by a duly authorized party, validating the existence, ownership, and nature of the rights claimed. Claims for protection made under this provision are subject to independent verification by CBP, which maintains sole discretion as to whether to accept such claims for enforcement. CBP may require additional information where the written affidavit fails to provide sufficient clarity as to the nature or ownership of the work for which enforcement is being sought.

(4) For claims to copyright in U.S. sound recordings and motion pictures or similar audio-visual works pending registration with the U.S. Copyright Office, recordation applications must also contain a copy of a valid registration application with respect to the work and acceptable proof that such has been officially filed with the U.S. Copyright Office. Claims for protection made under this section are subject to independent verification by CBP, which maintains sole discretion as to whether to accept such claims for enforcement. CBP

may require additional information where the copy of the registration application provided fails to provide sufficient clarity as to the nature or ownership of the work for which enforcement is being sought. The applicant must provide proof of registration with the U.S. Copyright Office no later than six months after the date of the application for recordation. Such proof will consist of an "additional certificate of registration" (see 17 U.S.C. 706.) issued by the U.S. Copyright Office. In the event that the applicant fails to provide CBP with proof that a registration has been issued by the U.S. Copyright Office, CBP will cancel the related recordation. Where the name of the applicant for CBP recordation differs from the name of the copyright owner identified in the registration application filed with the U.S. Copyright Office, the application for recordation must be accompanied by a certified copy of any assignment, exclusive license, or other document showing that the party applying for recordation has acquired an ownership interest in the copyright.

(c) CBP reserves the right to cancel any recordation which it determines has been obtained in any manner contrary to law.

(d) Fee. Applications to record protected copyrighted works with CBP must be accompanied by a fee of $190 in the form of a check or money order made payable to the Bureau of Customs and Border Protection for each claim to copyright to be recorded. In order to reduce processing costs for business and government, CBP may enter into alternative fee arrangements with persons, companies, agents, or associations. Such alternative fee structures will be subject to review on a periodic basis to ensure fairness, equity, and administrative efficiency. Fees in any such alternative structure will reflect costs for services provided in processing the applications for recordation, including data input, tracking of amounts paid, review for sufficiency, interface with field officers (principally, maintenance of intranet and internet databases for field and trade use), record maintenance, and any correspondence and associated administrative costs regarding filing, issue resolution, and recordation. Any recordation under such an alternative arrangement will remain in effect for twenty years or until the copyright ownership expires. Any lump sum fee arrangement will be valid only for renewable annual periods. No such alternative arrangement will become effective until published in the **Federal Register** by DHS/CBP, with Treasury concurrence. The difference in the per recordation rate under the alternative arrangement and the standard single recordation fee should not exceed the difference in processing costs. If the difference in the per recordation rate under the alternative arrangement and the standard single recordation fee exceeds the difference in processing costs, the alternative arrangement fees in the following year will be adjusted to compensate for that difference.

5. Section 133.33 is removed and reserved.
6. The heading to subpart E is revised to read as follows:

Subpart E – Enforcement of the Prohibition on Importation of Infringing Copies or Phonorecords

7. Section 133.42 is revised to read as follows:

§ 133.42 Piratical articles; Unlawful copies or phonorecords of protected copyrighted works.

(a) Definition. "Piratical articles" are those which are unlawfully made (without the authorization of the copyright owner) copies or phonorecords of protected copyrighted works. "Protected copyrighted works" for these purposes refers to works falling into any of the following categories:

(1) U.S. works registered with the U.S. Copyright Office and duly recorded with CBP pursuant to § 133.32;

(2) Non-U.S. works that are protected under 17 U.S.C. 104 (including sound recordings and motion pictures or similar audio-visual works) and where relevant ownership information is recorded with CPB pursuant to § 133.32;

(3) U.S. sound recordings and motion pictures or similar audio-visual works which have been duly recorded with CBP pursuant to § 133.32.

(b) Detention.

(1) Detention of suspected piratical articles (other than sound recordings and motion pictures or similar audio-visual works) that are recorded with CBP. Imported articles appearing to be piratical copies of protected copyrighted works, other than sound recordings and motion pictures or similar audio-visual works, for which a claim to copyright has previously been recorded with CBP pursuant to § 133.32, may be detained for a period not to exceed 30 days, if CBP has reasonable suspicion to believe that they constitute piratical copies. Upon determination by the IPR Branch, CBP Office of Regulations & Rulings, that such detained articles constitute piratical copies, CBP will seize them and institute forfeiture proceedings in accordance with part 162 of this chapter. Articles that are not determined by the IPR Branch within 30 days to be piratical copies will be released.

(2) Detention of suspected piratical sound recordings and motion pictures or similar audio-visual works. Imported articles consisting of sound recordings and motion pictures or similar audio-visual works may be detained for a period not to exceed 30 days if CBP has reasonable suspicion to believe that they constitute piratical copies. Where the genuine works or sound recordings are not recorded with CBP at the time of detention of suspected piratical copies, recordation must take place no later than 30 days after the date on which the suspect articles were detained. Upon determination by CBP that such detained articles constitute piratical copies, CBP will seize them and institute forfeiture proceedings in accordance with part 162 of this chapter, provided that the copyright has been recorded with CBP pursuant to § 133.32. Articles not recorded with

CBP within 30 days or articles which are not determined by CBP to be piratical copies will be released.

(3) Detention of articles suspected of constituting violations of the Digital Millennium Copyright Act (17 U.S.C. 1201(b)(1)). Imported articles appearing to constitute violations of 17 U.S.C. 1201(b)(1) may be detained for a period not to exceed 30 days if CBP reasonably believes that such articles are primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner; have only limited commercially significant purpose or use other than to circumvent such protection; or are marketed by the importer or trafficker, or another acting in concert with the importer or trafficker, for use in circumventing such protection. Upon determination by the IPR Branch, CBP Office of Regulations & Rulings, that such detained articles constitute violations of 17 U.S.C. 1201(b)(1) CBP will seize them and institute forfeiture proceedings in accordance with part 162 of this chapter. Articles that are not determined by the IPR Branch to constitute violations of 17 U.S.C. 1201(b)(1) will be released.

(c) Seizure and forfeiture. Articles which have been seized and forfeited to the U.S. Government will be disposed of in accordance with § 133.52 of this part, subject to the importer's right to petition for relief from the seizure and forfeiture under the provisions of part 171 of this chapter.

(1) Seizure of copies of articles (other than sound recordings and motion pictures or similar audio-visual works).

(i) Imported articles which, at the time of presentment to CBP, clearly constitute piratical copies of protected copyrighted works other than sound recordings and audio-visual works, for which a claim to copyright has previously been recorded with CBP pursuant to § 133.32 are subject to immediate seizure. After seizure, piratical goods are subject to forfeiture proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(ii) Imported articles detained pursuant to § 133.42(b)(1) that are determined by CBP to constitute piratical copies are subject to seizure. After seizure, piratical goods are subject to forfeiture proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(2) Seizure of sound recordings and motion pictures or similar audio-visual works.

(i) Imported articles which, at the time of presentment to CBP, clearly constitute piratical copies or phonorecords of protected copyrighted works, for which a claim to copyright has previously been recorded with CBP pursuant to § 133.32 are subject to immediate seizure. After seizure, piratical goods are subject to forfeiture

proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(ii) Imported articles which have been detained pursuant to § 133.42(b)(2), for which a claim to copyright has been recorded with CBP within 30 days after the date on which the suspect articles were detained, that are determined by CBP to constitute piratical copies are subject to seizure. After seizure, piratical goods are subject to forfeiture proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(iii) Recordings of live musical performances determined by CBP to be in violation of 18 U.S.C. 2319A will be subject to seizure regardless of the recordation of any right with CBP. After seizure, piratical goods are subject to forfeiture proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(3) Seizure of articles determined by CBP to constitute violations of the Digital Millennium Copyright Act (17 U.S.C. 1201(b)(1)). Imported articles determined by the IPR Branch, CBP Office of Regulations & Rulings to constitute violations of 17 U.S.C. 1201(b)(1) are subject to seizure regardless of the recordation of any right with CBP. After seizure, such goods are subject to forfeiture proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(d) Disclosure. When merchandise is seized under this section, CBP will disclose to the owner of the protected copyrighted work (in the case of copyright piracy) or the producer, or duly authorized agent thereof, of circumvented copyright protection systems (in seizures effected for DMCA violations), the following information, if available, within 30 days, excluding weekends and holidays, of the date of the notice of seizure:

(1) The date of importation;

(2) The port of entry;

(3) A description of the merchandise;

(4) The quantity involved;

(5) The name and address of the manufacturer;

(6) The country of origin of the merchandise, if known;

(7) The name and address of the exporter;

(8) The name and address of the importer; and

(9) Information from available shipping documents (such as manifests, air waybills, and bills of lading), including mode or method of shipping (such as airline carrier and flight number) and the intended final destination of the merchandise.

(e) Samples available to the copyright owner. At any time following detention or seizure of the merchandise, CBP may provide a

sample of the suspect merchandise to the owner of the protected work for examination, testing, or any other use in pursuit of a related private civil remedy for copyright infringement. To obtain a sample under this section, the owner of the protected work must furnish to CBP a bond in the form and amount specified by the port director at the port of importation, conditioned to hold the U.S., its officers and employees, and the importer or owner of the imported article harmless from any loss or damage resulting from the furnishing of a sample by CBP to the copyright owner. This requirement may be waived at the discretion of the port director where the value of the sample is less than $50.00. CBP may demand the return of the sample at any time. The owner of the protected work must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use in pursuit of a related private civil remedy for copyright infringement. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the protected work, the owner of the protected work must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] provided by CBP pursuant to § 133.42(e) of the CBP Regulations was (damaged/destroyed/lost) during examination, testing, or other use."

(f) Parallel Imports. Copies or phonorecords made lawfully and imported into the U.S. without the consent of the owner of the protected copyrighted work, are not subject to detention, seizure, or forfeiture by CBP.

8. Section 133.43 is removed and reserved.
9. Section 133.44 is removed and reserved.
10. Section 133.46 is revised to read as follows:

§ 133.46 Demand for redelivery of released articles.

If CBP determines that articles which have been released from CBP custody are subject to the prohibitions or restrictions of this subpart, the appropriate field officer will promptly make demand for redelivery of the articles pursuant to § 141.113 of this chapter, under the terms of the bond on CBP Form 301, containing the bond conditions set forth in § 113.62 of this chapter. If the articles are not redelivered to CBP custody, a claim for liquidated damages may be made in accordance with § 141.113(h) of this chapter.

ROBERT C. BONNER,
Commissioner of Customs and Border Protection.

Approved: September 30, 2004

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury

[Published in the Federal Register, October 5, 2004 (69 FR 59562)]

PROPOSED COLLECTION; COMMENT REQUEST

Canadian Border Boat Landing Permit

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Canadian Border Boat Landing Permit. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 6, 2004, to be assured of consideration.

ADDRESS: Direct all written comments to Bureau of Customs and Border Protection, Information Services Group, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Canadian Border Boat Landing Permit
OMB Number: 1651–0108
Form Number: Form I–68

Abstract: This collection involves information from individuals who desire to enter the United States from Canada in a small pleasure craft.

Current Actions: This is an extension of a currently approved information collection.

Affected Public: Individuals or Households

Estimated Number of Respondents: 68,000

Estimated Time Per Respondent: 10 minutes

Estimated Total Annual Burden Hours: 11,288

Dated: October 8, 2004

TRACEY DENNING,
Agency Clearance Officer,
Information Services Group.

[Published in the Federal Register, October 5, 2004 (69 FR 59605)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, October 6, 2004,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

Sandra L. Bell for MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF A RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE COUNTRY OF ORIGIN MARKING OF FLAT FLEXIBLE MAGNETS

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of revocation of a country of origin marking ruling letter and revocation of treatment relating to the country of origin marking of flat flexible magnets.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs and Border Protection (CBP) is revoking one ruling letter relating to the country of origin marking of flat flexible magnets. Similarly, CBP is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed revocation was published in the *Customs Bulletin* on February 18, 2004, Vol. 38, No. 8. Seven comments were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 19, 2004.

FOR FURTHER INFORMATION CONTACT: Shari Suzuki, Special Classification and Marking Branch: (202) 572–8818.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective.

Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice proposing to revoke Headquarters Ruling Letter (HQ) 562537, dated December 12, 2002, was published on February 18, 2004, in Vol. 38, No. 8, of the *Customs Bulletin*.

As stated in the notice of proposed revocation, this revocation covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during the notice period that closed on March 19, 2004.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved in substantially identical transactions should have advised CBP during the notice period. An importer's failure to advise CBP of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 562537, CBP ruled that imported sheets and rolls of "magnetized rubber material" were substantially transformed into new

and different articles of U.S. origin when further processed in the U.S. by cutting and printing operations. CBP believed that the sheeting was not a finished object but rather a raw material with a variety of potential applications. After reviewing the ruling, additional information and comments received in response to the notice of proposed revocation, CBP has determined that the cited ruling is in error as it pertains to the country of origin marking. The imported flat flexible magnet material in sheets and rolls are not raw materials with a wide variety of uses. The use of the flat flexible magnet is pre-determined by the character of the imported flat flexible magnetic sheeting. The application of printed advertising material to the surface of the imported magnetic sheeting does not change the character or use of the flat flexible magnetic sheeting. The imported article already has its final character and is dedicated to its specific use as a magnet at the time of import and the operations performed in the United States are merely finishing operations which do not confer origin. Accordingly, the articles must be properly marked to indicate the country of origin to the ultimate purchaser.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking HQ 562537 and any other ruling not specifically identified, to reflect the proper country of origin marking pursuant to the analysis set forth in HQ 562803, set forth as Attachment A to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical merchandise.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective sixty (60) days after its publication in the *Customs Bulletin.*

DATED: September 30, 2004

Monika R. Brenner for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 562803
September 30, 2004
MAR-05 RR:CR:SM 562803 SS
CATEGORY: Marking

WILLIAM A. ZEITLER, ESQ.
SULLIVAN & WORCESTER
1666 K Street NW
Washington DC 20006

RE: Revocation of HQ 562537 (December 12, 2002); Country of origin marking requirements applicable to flexible magnets manufactured in the U.S. from imported flat flexible magnet material in sheets and rolls

DEAR MR. ZEITLER:

This is in reference to Headquarters Ruling Letter ("HQ") 562537, issued to you on behalf of Magnet LLC on December 12, 2002, regarding the country of origin marking requirements applicable to flexible magnets.

In HQ 562537, Customs found that imported sheets and rolls of "magnetized rubber material" were substantially transformed into new and different articles of U.S. origin when further processed in the U.S. by cutting and printing operations.

We have had an opportunity to review the previous ruling and additional information and now believe the ruling to be incorrect for the reasons explained below. This ruling also provides the correct marking determination for the flexible magnets.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of HQ 562537, as described below, was published in the Customs Bulletin, Volume 38, No. 8, on February 18, 2004. CBP received seven comments. Six comments supported the proposed revocation. One comment opposed the proposed revocation. We note that we also met with counsel and representatives of Magnet LLC on August 19, 2004.

FACTS:

The flexible magnets were described in HQ 562537 as follows:

> We are informed that Magnet LLC is a U.S. producer and importer of promotional products such as key chains, flat flexible magnets, pens, and desk accessories. You indicate that Magnet LLC plans to import flat sheets and/or rolls of magnetized rubber material from China into the U.S. for further processing into flexible magnets. The finished magnets will be custom-made to the specifications of its customers to advertise and display specific customer products, services, trademarks, trade names and logos.
>
> Subsequent to importation into the U.S., the flat sheets/rolls of magnetized rubber material are subject to a variety of processing operations that include designing, cutting, shaping, silk screening and printing, which result in the creation of promotional magnets.

The flat flexible magnets, whether or not in sheet or roll form, are thermoplastic bonded, permanent ferrite magnets with a multi-pole magnetic arrangement designed to grip metallic surfaces. Flat flexible magnets are magnetic materials that are consolidated in polymeric binders by blending and then formed by calendaring.

Flat flexible magnets are made by a process that begins with ferric oxide and yields sheets or rolls of flexible magnets. The manufacturing process begins with the preparation of strontium ferrite by milling iron oxide and strontium carbonate to desired particle size and combining the milled ingredients. This slurry is fired in kilns to produce strontium ferrite.

The strontium ferrite is ground to a prescribed uniform particle size to create a fine magnetic ferrite powder. The precise composition and quality of the powder is one determinant of the uniformity and strength of a flexible magnet. The powder is combined with a binder of rubber, plastic and/or other components into a blended material of uniform composition. The composition of the binder affects the magnet's ultimate attractive power, mechanical characteristics, compatibility with adhesives, resistance to chemical attack and ability to meet child safety requirements. The binder utilized in the instant flat flexible magnets is suitable for magnets used in advertising applications.

After blending, the resulting magnetic material is ground into a particulate. The magnetic particulate is fed into a calendar where it is pressed between two large steel rolls in a heated, temperature-controlled environment, so as to produce a magnetic sheeting of uniform thickness and surface finish. The flat flexible magnet material is wound up on a roll as it exits the calendar. The operating conditions of the calendar are significant determinants of the quality and functionality of the flat magnet produced. The roll of flat flexible magnet material is taken from the calendar to a line where it is magnetized by passing it through magnetic rolls that orient the ferrite particles in the magnet.

At the conclusion of these processes, the finished product is flat flexible magnet material in sheets or rolls. Its magnetic properties are set and the product will adhere to metal objects. The sheets or rolls can be cut into smaller shapes or used in sheet form (for example, advertising applied to the side of a commercial motor vehicle). The flat flexible magnet material can be printed and laminated.

ISSUE:

Whether the flat flexible magnet material imported in rolls or sheets are substantially transformed by printing and cutting operations performed in the United States?

LAW & ANALYSIS :

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. 1304 was "that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing

where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297, 302 (1940).

Part 134, Customs Regulations (19 CFR Part 134), implements the requirements and exceptions of 19 U.S.C. 1304. "Country of origin" is defined in 19 C.F.R. 134.1(b) as follows:

> "Country of origin" means the country of manufacture, production or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part.

As stated in HQ 562537, a substantial transformation occurs "when an article emerges from a process with a new name, character, or use different from that possessed by the article prior to processing." The question in this case is whether the flat flexible magnet material imported in rolls or sheets is substantially transformed by the printing and cutting operations that occur in the United States.

In HQ 562537, the ruling that is being revoked, we stated that the sheets or rolls of flat flexible magnet material were substantially transformed because we believed that the sheeting was not a finished object but rather a raw material with a variety of potential applications. We indicated that the sheeting possessed little or nothing in its character to indicate its ultimate shape or use. We also indicated that the flat flexible magnets' essential character as promotional material was permanently determined only after the U.S. processing.

However, we now find that the imported flat flexible magnet material in sheets or rolls is not a raw material with a wide variety of uses. The composition and manufacturing process create a specific type of magnet differentiated from other types of magnets. The selection of the magnetic ferrite powder and binders serve to pre-determine the performance characteristics and applications of the resulting magnet. Thus, the use of the flat flexible magnet is pre-determined by the character of the imported flat flexible magnet sheeting.

You contend that Customs erroneously concludes that the rolls or sheets of flat flexible magnet material are finished products. In the notice of proposed revocation, Customs did not find that the rolls or sheets were finished products, but rather that they were not raw materials with a wide variety of uses. While we agree that the rolls and sheets must be further processed to be used as promotional magnets, the imported sheets or rolls have been processed to the point where their future use is determined. You argue that flat flexible magnets have a variety of applications such as point of purchase displays, visual aids, retail signage, bin markers, menus and message boards. However, flat flexible magnets are used in all these applications because they are magnetic and can be applied and removed repeatedly without damage to the articles on which they are placed and because they have a flat surface on which information or designs can be displayed.

The ruling that is being revoked cited to rulings which support the view that cutting or shaping materials to defined shapes or patterns suitable for use in making finished articles, as opposed to mere cutting to length or width which does not render the article suitable for a particular use, constitutes a substantial transformation. The rationale was that prior to the cut-

ting or shaping operations, the imported material was a raw material which possessed nothing in its character which indicated anything regarding its final use. However, we now find those rulings to be inapplicable.

In each of the cited rulings, the imported material was a raw, multi-use material which was not dedicated to a particular use. Multiple and substantial manufacturing operations were carried out on the material. The manufacturing operations not only changed the form or shape of the material into a newly recognizable product but also changed the material's character. The finished items (gift bags, components for a high-density hydraulic baler, venetian blind slats) were clearly distinguishable from the material from which they were made (decorative paper, steel plates, aluminum strip). Furthermore, the cutting and shaping of the metal sheets or strips transformed the material into identifiable components used in making finished goods. In contrast, the imported flexible magnet material in sheets or rolls are not raw materials. The flat flexible magnet material is at an advanced stage of manufacture. It is committed to a single use, as a magnet, at the time of import.

Furthermore, the cutting process differs dramatically from the complex shaping processes described in the cited rulings. The cutting performed in the instant case merely serves to make smaller magnets out of larger magnet sheeting. The process typically involves nothing more than stamping smaller shapes (e.g., business card-sized magnets) out of large sheets. Customs has held that cutting sheets of trading cards into individual cards does not effect a substantial transformation of imported card stock. HQ 560155, dated April 10, 1997. The cutting process does not affect the magnet's fundamental character and use as a magnet.

Additionally, the printing of advertising information on the magnets does not constitute a substantial transformation. The printing does not materially alter the name, character or use of the imported articles. At the time of importation, the articles have magnetic properties. The use of the articles is as magnets. After the printing of the advertising information, they remain articles properly referred to as magnets. The fact that the magnets may also be used for advertising purposes does not materially change their underlying use as magnets. The printing does not transform the imported article so that it is no longer the essence of the final product. Customs has held that similar promotional items processed and printed in the United States were not substantially transformed. See HQ 735401, dated April 5, 1994, HQ 734053, dated September 20, 1991, and HQ 734202, dated November 12, 1991. Both before and after the printing, the essence of the article in question is a finished magnet. Based on these considerations, we find that printing is merely a minor manufacturing process which leaves the identity of the imported articles intact.

In the notice of proposed revocation, we indicated that the processes performed in the U.S. were "not as many or as character-altering as originally believed." We stated that the cutting and printing were "modest finishing operations" which were in stark contrast to the complex manufacturing operations performed in producing the rolls of flexible magnetic material.

In your comments and during our meeting, you presented evidence that supported the view that the processing in the United States is complex and adds value. You described a multi-step process that is performed on the imported rolls and sheets which includes artistry and design. You indicated that the sheets and rolls represent less than 20 percent of the total expenses

in producing the finished magnets. You emphasized a high labor component and the use of complex machines. Upon review of all the information you submitted, we agree that the production that occurs in the U.S. is significant. However, the question is whether or not that production is enough to effect a substantial transformation. The answer in this case comes down to whether the essence of the product is the advertising or the magnet. You emphasized that the products are sold as "advertising." However, the medium for the "advertising" that you chose is a magnet. Customs finds that the manufacturing operations involved in creating the rolls or sheets of flexible magnet material establish the essential character and fundamental use of the product which remain unchanged after the essentially decorative processing that occurs in the United States.

In HQ 734091, dated June 2, 1992, Customs ruled that the production of stainless steel sheets with a mirror finish from sheets of stainless steel was not a substantial transformation. Customs stated that although the processing was complex involving considerable time, skill and complicated machines, the basic character of the stainless steel did not change. The commodity was still a sheet of stainless steel. Customs also relied on the fact that the importer had not changed the underlying chemical, physical and mechanical properties or structure of the stainless steel. Customs stated that cosmetic changes in metal products are generally not considered significant in light of predetermined qualities and specifications. The importer argued that the complexity of the process and the increase in value of the product should establish that the product was substantially transformed. Customs stated that "[a]lthough the processing may be complex and adds significant value, these are secondary criteria which are not dispositive of a substantial transformation." Similarly, in the instant case, we find that the processing in the United States does not effect a substantial transformation because it does not change the character of the magnet. Despite the complex processing that may have been done, the products do not lose their identity as magnets.

In HQ 561025, dated October 21, 1998, Customs considered whether the processing of bulk film into 110 and 135 photographic film cartridges constituted a substantial transformation. Bulk photographic film was imported into the U.S. in "jumbo" rolls. The jumbo rolls were slit into smaller rolls, cut to exact lengths, subjected to latent image flashing (where images such as frame numbers and arrows were printed on the film), and assembled into film cartridges. Customs stated:

> Accordingly, following the three-pronged test of name, character and use, it is our opinion that the imported product is the "essence" of the completed article, and thus does not undergo a substantial transformation. While commercially identified as a "jumbo" upon importation and when completed as "cartridge film" or "film cartridge," we do not find this fact significant as the imported product is bulk color photographic print film with a predetermined use which has the essential chemical properties of the completed product. The chemical and physical changes which occur in the U.S. do not change its character or its intended use as photographic film. As in *Superior Wire*, supra, the imported and finished articles may be viewed as different stages of the same product.

Applying this rationale to the present case, Customs finds that the processing of the large rolls of flexible magnetic material into smaller promotional magnets does not create a product with a new name, character and use. The changes which occur in the U.S. do not change the imported product's character or its intended use as magnets.

In *Superior Wire v. United States*, 867 F.2d. 1409 (Fed.Cir. 1989) the Court of Appeals for the Federal Circuit affirmed the Court of International Trade holding that the drawing of wire rod into wire does not substantially transform wire rod into a new product for the purpose of determining the country of origin. The CAFC stated:

> The Court of International Trade considered the "transformation of wire rod to be minor rather than substantial." . . . The court found there was no significant change in use or character, but there was a change in name, . . . and concluded that "wire rod and wire may be viewed as different stages of the same product." . . .
>
> Although noting that "the wire emerges stronger and rounder after" drawing the wire rod, the court found "its strength characteristic . . . is . . . metallurgically predetermined . . . through the fabrication of the wire rod.". . . The court explained that "the chemical content of the rod and the cooling processes used in its manufacture . . . determine the properties that the wire will have after drawing.". . . There was evidence of record to show that the rod producer determines the tensile strength of the drawn wire by the chemistry of the steel, particularly by the mix of carbon and manganese in the molten steel rods, and that the properties desired in the drawn wire dictate the selection of the scrap grade.

867 F.2d. at 1414 (citations omitted). It concluded that there was ample evidence from which the Court of International Trade could determine that there is no change in use between the wire rod and the wire. The Court reasoned that the end use of the wire is generally known before the rolling stage and the specifications are frequently determined by reference to the end product for which the drawn wire will be used.

Similar to the wire, the key characteristic of the flat flexible magnets processed in the United States is predetermined by the nature of the imported flexible magnetic sheeting. The chemical/metallurgical composition, resistance to heat or chemicals, thickness, consistency or dimension, resistance to tearing, and, most importantly, the magnetic properties, have been predetermined and are not and cannot be altered by the finishing processes performed in the United States. The composition of the binder is a critical factor in determining the magnet's strength. Furthermore, one of the comments received indicates that the grade of iron oxide powders will affect the performance characteristics of the strontium ferrite powder produced, and ultimately, the flat flexible magnet produced. There is no change in use between the flexible magnetic sheeting and the flat flexible magnets sold by the distributors/printers. Both are magnets and are used as such.

In *Anheuser-Busch Brewing Association v. United States*, 207 U.S. 556 (1908), the issue was whether the operations performed on hand cut corks in order to make them suitable for use in bottling beer constituted "manufacture" in the United States. The operations included sorting, branding with a brewer's name and logo, removing dust and bugs, and coating in order to prevent a cork taste from migrating to the beer. The Appellant argued that

the corks were not suitable for use to bottle beer until these processes were performed. The Court held that, "A cork put through the claimants process is still a cork." *Id.* at 562. The corks did not become articles of U.S. manufacture "by reason of the special treatment to which they had been subjected, making them better or necessary for their purpose." *Id.* at 563. Similarly, the imported flat flexible magnets are still flat flexible magnets after being put through the cutting and printing processes. They retain their essential characteristic. The ultimate consumer uses them mainly for their magnetic properties. Printing a magnet with advertising information is no more a substantial transformation than branding a cork with a brewer's name and logo.

In *Ferrostaal Metals Corp. v. United States*, 11 C.I.T. 470, 664 F. Supp. 535 (1987), the Court addressed whether hard cold-rolled steel was substantially transformed when it was processed into continuous hot-dip galvanized steel. The processing consisted of galvanizing and annealing. The Court found that strength and ductility constituted important characteristics of the steel and that annealing significantly affected the character by dedicating the sheet to uses compatible with the strength and ductility of the steel. The Court also found that the alloy-bonded zinc coating affected the character of the sheet by changing its chemical composition and by providing corrosion resistance. The Court held that the continuous hot-dip galvanizing process transforms a strong, brittle product which cannot be formed into a durable, corrosion-resistant product which is less hard, but formable for a range of commercial applications. It had a different character from the standpoint of durability. The Court found that the annealing and galvanizing process resulted in a change in character by significantly altering the mechanical properties and chemical composition of the steel sheet. In contrast, the mechanical properties and chemical composition of the imported rolls or sheets of flexible magnet material are not altered by the cutting and printing operations that occur in the United States.

Customs finds that there is no material change in the name[1], essential character or use of the imported articles that results from printing them with promotional material and cutting them to make smaller flat flexible magnets. As imported, the flexible magnetic sheeting fully evidences its ultimate use by consumers as magnets. Although the size of the resulting magnets may not be fully established on importation, their thickness and maximum length and breadth, the degree to which they are flexible, their magnetic characteristics, and such properties as tensile strength, child safety, and resistance to heat or chemicals all have been fixed prior to that time. The imported article already has its final character and is dedicated to its specific use as a magnet at the time of import. Accordingly, the operations performed in the United States do not substantially transform the imported rolls or sheets of flat flexible magnet material.

We note that the processing in the United States will not result in a change of tariff classification. Both the imported product and the finished good are classified under subheading 8505.19.0040, HTSUSA, as flexible

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[1] The original ruling request referred to the imported material as "magnetized rubber material" to suggest a change in the name of the product. However, a commenter indicates that such terminology is not used in the trade. The imported product is flat flexible magnet in sheet form. Flexible magnet in sheet form is already a "flat flexible magnet." Regardless of the size or length of the sheet or whether the sheet is in a roll, the imported material is flat flexible magnet.

permanent magnets. Although a change in tariff classification is not required in order for there to be a substantial transformation, we find the fact that there is no change in tariff classification to be an additional factor to consider in this case. You objected to this argument stating that change in classification was only relevant in the NAFTA context. However, in *Ferrostaal*, the Court stated that it also considered relevant whether the operations underlying the asserted transformation had effected a change in the classification of the merchandise and stated that change in tariff classification may be considered as a factor in the substantial transformation analysis. *Id.* at 478.

HOLDING:

HQ 562537, dated December 12, 2002, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Based on the facts provided, imported flat flexible magnet material in sheets and rolls are not substantially transformed into new and different articles of U.S. origin when further processed in the U.S. by printing and cutting operations to form flexible promotional magnets. Accordingly, the flat flexible magnets must be properly marked to indicate the country of origin to the person who receives them as a promotional item.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Monika R. Brenner for MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

ANNOUNCEMENT

Chief Judge Jane A. Restani has announced the call of the 13th Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Monday, November 8, 2004 at the Grand Hyatt, Park Avenue at Grand Central Station, New York, New York and will commence promptly at 8:30 a.m.

The theme of the Conference is: **"The Court in a New Age of Trade, Ethics and Automation."**

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Bureau of Customs and Border Protection, the Departments of Justice, Commerce and Treasury; members of the Bar of the Court; and other distinguished guests.

All interested persons are invited to attend. The Conference program, registration forms and additional information may be obtained through the Judicial Conference page on the Court's Website, **www.cit.uscourts.gov** or by contacting the Clerk's Office at 212–264–2800.

LEO M. GORDON,
Clerk of the Court.

September 29, 2004

Financial Hardship Policy

The U.S. Court of International Trade offers a discount of 15% off the conference/course fee to law students attending an accredited law school, solo attorneys admitted to the bar less than two years, government attorneys whose agencies/departments are not funding their attendance, attorneys who work for non-profit or legal services organizations, and unemployed attorneys. To qualify for the discount, submit a letter on your firm/agency/personal letterhead outlining how you qualify for the discount, along with a check in the amount of $140.25 and a completed registration form to the address listed above. Students must submit a copy of their current and valid Student ID card.

SLIP OP. 04–117

BEFORE: RICHARD K. EATON, JUDGE

SHANDONG HUARONG GENERAL GROUP CORPORATION & LIAONING MACHINERY IMPORT & EXPORT CORPORATION, PLAINTIFFS, v. UNITED STATES, DEFENDANT.

COURT NO. 01–00858
PUBLIC VERSION

[United States Department of Commerce's final results of redetermination affirmed in part, remanded in part to Commerce a second time]

Dated: September 13, 2004

Hume & Associates, PC (*Robert T. Hume*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch; *Jeanne E. Davidson*, Deputy Director, International Trade Section, Civil Division, Commercial Litigation Branch (*Paul D. Kovac*); *Barbara J. Tsai*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

OPINION AND ORDER

EATON, *Judge*: This matter is before the court following remand to the United States Department of Commerce ("Commerce"). In *Shandong Huarong General Group Corp. v. United States*, 27 CIT ___, slip op. 03–135 (Oct. 22, 2003) ("*Huarong I*"), this court remanded Commerce's determination in the ninth administrative review of heavy forged hand tools from the People's Republic of China ("P.R.C."), covering the period of review February 1, 1999, through January 31, 2000. *See* Heavy Forged Hand Tools From the P.R.C., 66 Fed. Reg. 48,026 (ITA Sept. 17, 2001) (final det.) ("Final Results"). Plaintiffs Shandong Huarong General Group Corporation ("Huarong") and Liaoning Machinery Import and Export Corporation ("LMC") (collectively the "Companies") had challenged that determination with respect to Commerce's decision to apply the P.R.C.-wide antidumping duty margin to their subject merchandise. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the reasons set forth below, this matter is affirmed in part, and remanded in part to Commerce with instructions to conduct further proceedings in conformity with this opinion.

BACKGROUND

The relevant facts and procedural history in this case are set forth in *Huarong I*. A brief summary of these is included here. On February 14, 2000, Commerce published a notice of opportunity to request

administrative reviews of the antidumping duty order covering heavy forged hand tools from the P.R.C. *See* Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation, 65 Fed. Reg. 7348, 7349 (ITA Feb. 14, 2000) (opportunity request admin. rev.). In response, several P.R.C. entities—including the Companies—requested administrative reviews. *See* Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the P.R.C., 65 Fed. Reg. 66,691, 66,692 (ITA Nov. 7, 2000) (prelim. results and prelim. partial rescission of antidumping duty admin. revs.) ("Preliminary Results"). Commerce then commenced its investigation and distributed standard nonmarket economy ("NME") country[1] antidumping questionnaires.

Based on information provided by the Companies in their original and supplemental questionnaire responses, Commerce determined that they were each preliminarily entitled to company-specific antidumping duty margins separate from the P.R.C.-wide antidumping duty margin. *See* Prelim. Results, 65 Fed. Reg. at 66,693. Commerce calculated Huarong's preliminary company-specific antidumping duty rate for bars/wedges to be 0.44%, and calculated LMC's preliminary company-specific antidumping duty rate for bars/wedges to be 0.01%. *See id.* at 66,696. The P.R.C.-wide antidumping duty rate for bars/wedges was preliminarily calculated to be 139.31%. *Id.*

Commerce then notified the Companies that it would conduct verification of their submitted sales and factors of production information. Commerce conducted verification of LMC's questionnaire responses from April 23 through April 26, 2001. *See* Verification in Dalian, Liaoning, the P.R.C, of the Questionnaire Resps. of LMC in the Antidumping Duty Admin. Rev. of Heavy Forged Hand Tools from the P.R.C., Conf. R. Doc. 73 ("LMC Verification Report"). In its verification report, Commerce noted that Company A[2], not Company B,[3] was actually the seller of an "overwhelming majority" of the bars and wedges, and that Company B's role was largely limited to processing shipping documents and payment receipts. *See* LMC Verification Report at 5. In other words, it was only at verification, and not before, that Commerce learned the actual nature of these transactions.

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[1] A "nonmarket economy" country is defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C)(i).

[2] As this opinion was initially issued in confidential form, the court referred to Huarong as Company A for ease of reading while maintaining confidentiality.

[3] As this opinion was initially issued in confidential form, the court referred to LMC as Company B for ease of reading while maintaining confidentiality.

Commerce then conducted verification of Huarong's questionnaire responses from May 2 through May 9, 2001. *See* Verification in Dongping Town, Shandong Province, the P.R.C., of the Questionnaire Resps. of Shandong Huarong Gen. Group Corp. in the Antidumping Admin. Rev. of Heavy Forged Hand Tools from the P.R.C., Conf. R. Doc. 74 ("Huarong Verification Report"). Again, as with LMC, Commerce made certain "significant findings," including that "[t]he overwhelming majority of sales activities for subject merchandise sales reported by [Company B] were actually performed by [Company A]." *Id.* at 1. Indeed, Commerce determined that the sales claimed by Company B were actually Company A's. *See* Application of Adverse Facts Available to Shandong Huarong General Group Corp., Conf. R. Doc. 84 at 3.

After review and analysis of the questionnaire responses and the information gathered at verification, Commerce determined that the use of facts available and adverse facts available was warranted as the Companies did not cooperate by acting to the best of their ability to comply with Commerce's requests for information. *See* Final Results, 66 Fed. Reg. at 48,028. As a result of these findings, the Companies' subject merchandise was assigned the final P.R.C.-wide antidumping duty rate of 47.88%. *See id.* at 48,030 n.1 ("Based on the results of this review the following companies are no longer eligible for separate rates . . . Huarong, and LMC."). The Companies then commenced an action for judgment upon the agency record pursuant to USCIT R. 56.2, arguing that Commerce's decision to apply the P.R.C.-wide antidumping duty margin to their subject merchandise was not supported by substantial evidence or otherwise in accordance with law. The court remanded, instructing Commerce to reevaluate the evidence submitted by the Companies with respect to their entitlement to separate rates, and "revisit . . . its determination that the Companies were to receive the PRC-wide antidumping duty margin." *Huarong I*, slip op. 03–135 at 45.

STANDARD OF REVIEW

The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (2000)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin*, 322 F.3d at 1374 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Furthermore,

"[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Abbott v. Donovan*, 6 CIT 92, 97, 570 F. Supp. 41, 47 (1983)).

DISCUSSION

I. Assignment of Separate Rates

In *Huarong I*, the court reviewed Commerce's decision to reject the Companies' separate rates evidence and, thus, assign them the P.R.C.-wide antidumping duty rate based on the presumption of state control. Commerce's decision rested on two bases—facts available, and resort to adverse facts available. Use of facts available is warranted where Commerce finds that a respondent has, *inter alia*, withheld or failed to provide the requested information. *See* 19 U.S.C. § 1677e(a)[4]; *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) ("The focus of subsection (a) is respondent's *failure to provide information*.") (emphasis in original). By contrast, the use of adverse facts available is warranted where Commerce finds that a respondent "has failed to cooperate by not acting to the best of its ability to comply with a request for information. . . ." *See* 19 U.S.C. § 1677e(b)[5]; *see also Nippon Steel*, 337 F.3d

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[4] This statute provides:

If—

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by the administering authority or the Commission under this subtitle,

(B) fails to provide such information by the deadline for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title, the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a).

[5] This statute provides:

If [Commerce] . . . finds that an interested party has failed to cooperate by not acting

at 1381 ("[S]ubsection (b) permits Commerce to 'use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available,' only if Commerce makes the separate determination that the respondent 'has failed to cooperate by not acting to the best of its ability to comply.'" (bracketing in original)). The Court of Appeals for the Federal Circuit stated that "[t]he focus of [1677e(b)] is respondent's *failure to cooperate to the best of its ability*, not its failure to provide requested information." *Nippon Steel*, 337 F.3d at 1381 (emphasis in original). The Court of Appeals further stated that "the statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Id.* at 1382.

A. Commerce's Use of Facts Available/Adverse Facts Available in Assigning Separate Rates

The court in *Huarong I* first determined that Commerce's use of facts available and adverse facts available was justified, with respect to the Companies' sales data and factors of production, on the grounds that the integrity of the Companies' reported data was compromised "due to the nature of [the Companies'] verification failures, and the inadequacy of [their] cooperation." The court also found that

> [t]his reasoning, however, cannot be the basis for assigning the Companies the PRC-wide antidumping duty margin based on facts available, as it is clear the Companies did provide evidence of their entitlement to separate rates and there is no indication that any necessary information was missing or incomplete. In other words, the findings that justified the use of facts available and a resort to adverse facts available with respect to the Companies' sales data and factors of production, cannot be used to accord similar treatment to issues relating to the Companies' evidence of independence from state control.

Huarong I, slip op. 03–135 at 41–42. With respect to Commerce's resort to adverse facts available, the court stated:

> to the best of its ability to comply with a request for information from [Commerce] . . . , [Commerce], in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—
>
> (1) the petition,
>
> (2) a final determination in the investigation under this subtitle,
>
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title,
>
> (4) any other information placed on the record.

19 U.S.C. § 1677e(b).

> [T]he record shows that the Companies apparently kept records sufficient to satisfy Commerce of their independence from state control and supplied such records to Commerce in a timely fashion. Because findings with respect to data Commerce found to be "compromised"—i.e., the Companies' sales data and Huarong's factors of production data—are distinct from those related to state control, it is difficult to see how Commerce's determination with respect to the sales and factors of production data can form the basis for the use of adverse facts available with respect to independence from state control.

Huarong I, slip op. 03–135 at 43–44. Upon remand, the court instructed Commerce to "revisit its determination that the Companies were to receive the P.R.C.-wide antidumping duty margin." *Id.* at 45. Pursuant to this directive, Commerce reconsidered its determination with respect to separate rates in the Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), and found that "[s]ince the Department found no specific discrepancies with respect to the separate rates information, we therefore determine that Huarong and LMC are entitled to separate rates." Remand Results at 2. Because no party disputes this finding, the court affirms Commerce's conclusion as to the Companies' entitlement to separate rates.

II. Commerce's Use of Adverse Facts Available in Calculating Separate Rates

Where a party fails to cooperate by not acting to the best of its ability to comply with a request for information from Commerce, 19 U.S.C. § 1677e(b) permits Commerce to

> use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—
>
> (1) the petition,
>
> (2) a final determination in the investigation under this subtitle,
>
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
>
> (4) any other information placed on the record.

Id. In *Huarong I*, the court sustained Commerce's use of adverse facts available as to the Companies' sales data, and Huarong's factors of production, since "the record show[ed] that LMC and Huarong did not make the maximum effort to produce the sales records in order to respond to Commerce's questionnaire requests.

Rather, the information contained in the questionnaire responses was inaccurate." *See Huarong I*, slip op. 03–135 at 36. Thus, although the court found unjustified the use of adverse facts available with respect to the separate rates determination, it found that the use of adverse facts available was justified in determining the rates themselves.

In its resort to adverse facts available, however, Commerce had a wide range of sources to look to. For instance, in accordance with 19 U.S.C. § 1677e(b), Commerce could have applied the petition rate, the rate from the final determination in this investigation,[6] the rate from any previous determinations,[7] or any other information placed on the record.[8] Thus, Commerce could have chosen rates ranging from 0.00% to 47.88%. Commerce, however, chose to apply an adverse facts available rate of 139.31% as the appropriate antidumping duty rate for the Companies. This rate, the highest calculated antidumping duty rate from any prior segment of the proceeding, was calculated for another Chinese respondent, Tianjin Machinery Import & Export Corp. ("TMC"), which produced the same bars/wedges covered by the antidumping duty order at issue here. *See* Heavy Forged Hand Tools From the People's Republic of China: Notice of Final Court Decision and Am. Final Results of Antidumping Duty Admin. Revs., 68 Fed. Reg. 37,121, 37,122 (June 23, 2003).

The Companies maintain that the facts in the case do not warrant resort to the highest allowable prior margin, since they "did not act with an intent to deceive or misrepresent any facts. Rather, plaintiffs believed they answered Commerce's questions during the 9th Review correctly and otherwise cooperated." Pls.' Comments on Final Results of Redetermination Pursuant to Remand ("Pls.' Comments") at 3. As the substance of these arguments was considered and rejected in *Huarong I*, they will not be reconsidered here. The Companies further argue that Commerce's corroboration was deficient; and that the adverse facts available rate has no probative value and is aberrational. The court will address these arguments in turn.

1. *The need to corroborate the 139.31% rate*

The Companies argue that Commerce must corroborate the infor-

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[6] The rate in the final determination for this review was 47.88%, the highest prior rate for either of the Companies. *See* Final Results, 66 Fed. Reg. at 48,030.

[7] In the seventh administrative review (1997–1998), for example, Huarong's rate was 1.27% and LMC's rate was 0.00%. *See* Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the P.R.C., 64 Fed. Reg. 43,659, 43,671 (ITA Aug. 11, 1999) (final results).

[8] For example, the rate Commerce chose, 139.31%, was the rate for another PRC producer, Tianjin Machinery Import & Export Corp. ("TMC"), in the eighth administrative review. TMC's rate dropped to 0.56% in the following review (1999–2000), and was 0.25% in the most recent review (2000–2001). *See* Final Results, 66 Fed. Reg. at 48,029; *see also* Heavy Forged Hand Tools From the P.R.C., 67 Fed. Reg. 57,789, 57,792 (ITA Sept. 12, 2002).

mation it relied upon in choosing their margins. In deciding upon an antidumping duty margin for an uncooperative respondent, Commerce may rely on "secondary information," and must corroborate that information, to the extent practicable, from independent sources. *See* 19 U.S.C. § 1677e(c). Such secondary information may include, but is not limited to, "published prices lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review." 19 C.F.R. § 351.308 (2004). Here, Commerce claims that, because it selected the Companies' rate based on an actual rate calculated for another P.R.C. company in the immediately preceding review, it did not rely on secondary information, and thus the corroboration requirement does not apply. *See* Remand Results at 4 ("[I]f the Department chooses, as total [adverse facts available], a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin if it was calculated from verified sales and cost data."); *see also Acciai Speciali Terni S.p.A. v. United States*, 25 CIT 245, 265, 142 F. Supp. 2d 969, 990 (2001) ("Since we are relying on verified data for use as adverse facts available for these unattributed sales, corroboration under 776(c) is not necessary.") (citing Stainless Steel Sheet and Strip in Coils From Italy, 64 Fed. Reg. 30,750, 30,760 (ITA June 8, 1999)). Whether or not the rate calculated for a third party constitutes secondary information need not be addressed, because the court is remanding questions relating to the selection of the Companies' rate on other grounds.

Nevertheless, the court finds the rationale underlying the corroboration requirement, as articulated by the Court of Appeals for the Federal Circuit, to be instructive in this case:

> It is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that *it intended for an adverse facts available rate to be a reasonably accurate estimate of the [plaintiff's] actual rate*, albeit with some built-in increase intended as a deterrent to non-compliance. Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin. Obviously a higher adverse margin creates a strong deterrent, but Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.

Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1340 (Fed. Cir. 2002) (emphasis added). Therefore, under the Federal Circuit's reasoning, Commerce must nonetheless ensure that

the rate chosen "[is] a reasonably accurate estimate of [each company's] actual rate. . . ." *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

2. *The adverse facts available rate is aberrational and has no probative value*[9]

The Companies argue that "Commerce made no effort to select a realistic rate"; rather, "Commerce simply selected the highest possible rate." Pls.' Comments at 7. They maintain that the 139.31% rate is aberrational because it "is over 90 percentage points higher than any other rate for bars/wedges." *Id.* at 10 (emphasis in original). They further argue that the 139.31% rate is not probative of their likely actual antidumping duty margins, because there is no evidence to show that their margins would otherwise be so large. The Companies state:

> Commerce says that the probative value comes because there was another exporter during the prior review that received the 139.31 percent margin. But, Commerce fails to address the fact that both Huarong and LMC participated in the 8th Review. Their margins were 28.96 and 29.10 percent, respectively. Commerce fails to explain that while the margin for TMC dropped from the 8th Review to the 9th Review,[10] Huarong's and LMC's should increase by almost 5 times.

Id. at 13 (emphasis in original). They also maintain that "[s]ince the rate was based on a different factory, for different bars, by a different seller, with different input steel, and unverified data, the figure is not realistic." *Id.* at 8.

It is well-settled that in determining the antidumping duty margin for an uncooperative respondent, such as the Companies here, "Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to noncooperation with its investigations and assure a reasonable margin." *De Cecco*, 216 F.3d at 1032. Thus, Commerce has "broad, but not unbounded, discretion in determining what would be an accurate and reasonable dumping margin where a respondent has been found uncooperative." *China Steel Corp. v. United States*, 28 CIT ____, ____, 306 F. Supp. 2d 1291,

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[9] The Companies further claim that the rate chosen by Commerce is punitive. As the court is remanding questions relating to the rate selected for other reasons, it need not address this claim. The magnitude of the increase alone, however, (from 47.88% in the final determination to the 139.31% rate at issue here) suggests that Commerce's selection of the 139.31% rate may have been punitive.

[10] TMC's rate dropped from 139.31% in the eighth administrative review to 0.56% in the ninth administrative review, a decline of 138.75%. It is the ninth administrative review that is at issue here.

1311 (2004). In exercising its discretion, however, Commerce cannot select a rate based solely on its interest in inducing foreign exporters to cooperate with Commerce's investigations. "Rather, the rate must have *some relationship* to commercial practices in the particular industry. . . . Commerce acts within its discretion so long as the rate chosen has a relationship to the actual sales information available." *Ta Chen*, 298 F.3d at 1339–40 (emphasis added). To that end, Commerce maintains that it

> examined the 139.31 percent rate and determined that it was relevant for use as an [adverse facts available] separate rate for plaintiffs because it was both "reasonable" and had "some basis in reality." . . . [T]his rate was the final separate rate "calculated for another PRC company, TMC, also in the immediately preceding review, and therefore reflects recent commercial activity by Chinese respondents that export bars/wedges to the United States.

Remand Results at 8. With respect to its contention that the 139.31% rate is relevant and has "some basis in reality," Commerce states,

> Given that Huarong and LMC failed to cooperate in the underlying review, the Department concludes that the dumping margins that would have been calculated for the respondents in the review are likely higher than the dumping margins calculated for Huarong and LMC in the immediately preceding administrative review. . . . Without complete and verifiable information from the respondents, *it is not possible to definitively determine how much higher* [such calculated dumping margins likely would have been]. . . .

Id. at 4 (emphasis added).

In order to satisfy substantial evidence, Commerce must go beyond simply stating that the 139.31% rate is "reasonable" and has "some basis in reality" because of the presumption arising from the failure to cooperate. Commerce must also show how the rate "bear[s] a rational relationship to the *interested party*. . . ." *See Reiner Brach GmbH & Co.KG v. United States*, 26 CIT ___ , ___ , 206 F. Supp. 2d 1323, 1339 (2002) (emphasis added); *see also China Steel Corp.*, 28 CIT at ___ , 306 F. Supp. 2d at 1339–40. Here, the 139.31% rate was calculated in a preceding administrative review for another P.R.C. producer, TMC, and not for the Companies. Thus, Commerce looked to the sales information for TMC in the eighth administrative review even though actual sales information for both Huarong and LMC was available for that same review. *See Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619, 623–24, 799 F. Supp. 110, 115 (1992) (margin bearing no rational relationship to the respondent invalidated). Indeed, the actual sales information from the Companies'

eighth administrative review shows that their rates were significantly lower than TMC's—Huarong's rate was 28.96%, and LMC's was 29.10%. *See* Heavy Forged Hand Tools From the P.R.C., 65 Fed. Reg. 50,499, 50,500 (ITA Aug. 18, 2000) (am. final results). Finally, even if the rate calculated for the Companies in the ninth administrative review may have been higher than the rate they received in the preceding review, Commerce has given no explanation as to why the rates would likely have increased so dramatically, i.e., by over 100 percentage points. Considering that the rate chosen by Commerce would have resulted in the Companies' respective rates increasing more than five-fold from the eighth administrative review to the ninth, Commerce has failed to show how its chosen rate of 139.31% bears a rational relationship to the actual sales data for the Companies. Moreover, this increase appears to contravene the statutory requirement that Commerce "determine antidumping duty margins as accurately as possible." *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994); *see also D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997) ("The statutory directive that Commerce use the best information available is intended to serve 'the basic purpose of the statute—determining current margins as accurately as possible.' ") (internal citation omitted). For these reasons, the court agrees with the Companies that the rate selected by Commerce is aberrational and is not probative of what the Companies' actual rate would likely have been had they cooperated with Commerce's investigation, "with some built-in increase intended as a deterrent to non-compliance." *Ta Chen*, 298 F.3d at 1340; *see also Ta Chen Stainless Steel Pipe, Inc. v. United States*, 24 CIT 841, 847 (2000) (not reported in the Federal Supplement) (noting the court's concern that the chosen antidumping duty margin bear a rational relationship to the respondent's sales); *Reiner Brach*, 26 CIT at ____, 206 F. Supp. 2d at 1339.

CONCLUSION

Based on the foregoing, the court finds the 139.31% antidumping duty rate selected by Commerce to be both aberrational and lacking in probative value, and not supported by substantial evidence. On remand, Commerce shall revisit the evidence cited for its decision to apply the 139.31% rate and, shall it continue to employ such rate, provide adequate explanations for this decision based on the evidence. In particular, Commerce shall explain its reasons for not choosing a previous antidumping duty rate for the Companies themselves. Remand results are due within ninety days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments eleven days from their filing.

Slip Op. 04–124

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

ROYAL THAI GOVERNMENT, ET AL., Plaintiffs, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Defendant-Intervenor.

Consol. Court No. 02–00026

JUDGMENT ORDER

Upon consideration of the Final Results of Redetermination on Remand (Sept. 15, 2004) ("Redetermination Results") filed by the U.S. Department of Commerce ("Commerce") pursuant to the Court's decision in *Royal Thai Government v. United States*, Slip Op. 04–91 (July 27, 2004), and all other papers filed herein, it is hereby

ORDERED that Commerce's findings in the Redetermination Results that "the total estimated net countervailing subsidy rate [is] *de minimis*" and "[w]ith this change . . . no countervailable subsidies are being provided to the production or exportation of certain hot-rolled carbon steel flat products from Thailand" are sustained.

SO ORDERED.

Slip Op. 04–125

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

TIANJIN MACHINERY IMPORT & EXPORT CORP., LIAONING MACHINERY IMPORT & EXPORT COMPANY, SHANDONG HUARONG GENERAL GROUP CORP., AND SHANDONG MACHINERY IMPORT & EXPORT CORP., Plaintiffs, v. UNITED STATES, Defendant, and AMES TRUE TEMPER, Defendant-Intervenor.

Court No. 02–00637

[Court sustains *Final Results*; Commerce's fifteen-day liquidation policy not in accordance with law.]

Dated: October 4, 2004

Hume & Associates PC (*Robert T. Hume*) for Plaintiffs Tianjin Machinery Import & Export Corp. and Shandong Huarong General Group Corp.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); *Barbara J. Tsai*, Of Counsel, Office

of Chief Counsel for Import Administration, United States Department of Commerce, for Defendant United States.

Wiley Rein & Fielding LLP (Eileen P. Bradner) for Defendant-Intervenor Ames True Temper.

OPINION

GOLDBERG, Senior Judge: In this action, Plaintiffs Tianjin Machinery Import & Export Corp. ("TMC") and Shandong Huarong General Group Corp. ("Huarong") (collectively "Plaintiffs")[1] challenge the final determination of the United States Department of Commerce ("Commerce") in the tenth administrative review of antidumping duty orders covering heavy forged hand tools in *Heavy Forged Hand Tools From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 67 Fed. Reg. 57789 (Sept. 12, 2002) ("*Final Results*").[2] The *Final Results* covers the period of review from February 1, 2000 through January 31, 2001. Pursuant to USCIT Rule 56.2, Plaintiffs move for judgment on the agency record.

For the reasons that follow, the Court sustains the *Final Results*, but finds that Commerce's new policy of issuing liquidation instructions within fifteen days of publication of the final results of review is not in accordance with law. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) and (i).

I. *STANDARD OF REVIEW*

The Court will sustain the *Final Results* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). To determine whether Commerce's construction of the statutes is in accordance with law, the Court looks to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first step of the test set forth in *Chevron* requires the Court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. It is only if the Court concludes that "Congress either had no intent on the

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[1] Plaintiffs Liaoning Machinery Import & Export Company and Shandong Machinery Import & Export Corp. were removed from the case pursuant to Plaintiffs' Second Amended Complaint filed on November 8, 2002. Second Am. Compl. at 1.

[2] After Commerce issued its *Final Results*, Plaintiffs and Defendant-Intervenor Ames True Temper filed ministerial error allegations with Commerce. *See* Hand Tools From the People's Republic of China – Clerical Errors In Final Determination, Proprietary Appendix to Motion of Plaintiffs Tianjin Machinery Import & Export Corp. and Shandong Huarong General Group Corp. for Judgment on the Agency Record ("Pls.' Conf. App.") at Ex. 5 (Sept. 16, 2002). On February 6, 2003, Commerce responded to the parties' allegations by issuing its Final Results of Redetermination Pursuant to Court Remand, *see id.* at Ex. 4, which Plaintiffs also challenge. Because the relevant portions of the Final Results of Redetermination Pursuant to Court Remand merely reiterate Commerce's stance in the *Final Results*, the Court will refer to both determinations collectively as the "*Final Results*."

matter, or that Congress's purpose and intent regarding the matter is ultimately unclear," that the Court will defer to Commerce's construction under step two of *Chevron*. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). If the statute is ambiguous, then the second step requires the Court to defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 842. In addition, "[s]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) (interpreting *United States v. Mead*, 533 U.S. 218 (2001)). Accordingly, the Court will not substitute "its own construction of a statutory provision for a reasonable interpretation made by [Commerce]." *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992).

II. *DISCUSSION*

A. Commerce's Decision to Apply Adverse Facts Available to the Packing Factor of Production for TMC's Hammers/Sledges Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

For the cost portion of TMC's verification, Commerce preselected one of TMC's three hammer factories. *See* Defendant's Response in Opposition to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record ("Def.'s Br.") at 6. When Commerce arrived at the factory, Commerce discovered that it had closed approximately ten months before verification. *See* Verification Report (TMC's Hammer Factory), Defendant's Appendix to Defendant's Response in Opposition to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record ("Def.'s App.") at Ex. 7 (July 24, 2002). As a result, there were no packing materials present that Commerce could weigh to verify the packing factors reported in the review. *Id.* at 8. Moreover, there were no records available documenting the weights of the packing materials. *See id.* Commerce concluded that adverse inferences were warranted, and therefore applied the highest reported packing rate as adverse facts available ("AFA") for all of TMC's hammers, regardless of whether they were made by the closed factory or not. *See* Issues and Decision Memorandum for the Administrative Reviews of Heavy Forged Hand Tools from the People's Republic of China – February 1, 2000 through January 31, 2001, Def.'s App. at Ex. 11 at Cmt. 22 (Sept. 3, 2002) ("Issues and Decision Memo"); Memorandum of Points and Authorities in Support of Motion of Plaintiffs Tianjin Machinery Import & Export Corp. and Shandong Huarong General Group Corp. for Judgment on the Agency Record ("Pls.' Br.") at 9.

The asserted basis for Commerce's decision to apply AFA is that "TMC was responsible for demonstrating the reliability of its own data, [and] its failure to do so supports [the] conclusion that [TMC]

did not act to the best of its ability." Issues and Decision Memo at Cmt. 22. Commerce assumes that "when a respondent prepares its response, it [will] maintain the records which were used to compile its data." *Id.* Furthermore, Commerce reasons that because TMC maintained records for a variety of reported factors of production despite the closure of its factory, "[i]t is . . . reasonable to assume that [TMC] would have maintained records for all reported [factors of production,]" including packing factors. *Id.* Thus, Commerce concluded that TMC's failure either to maintain packing records or to provide actual packing materials for weighing constituted a failure to act to the best of its ability, warranting application of AFA. *See id.*

Before Commerce is allowed to apply AFA, Commerce must find that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information[.]" 19 U.S.C. § 1677e(b). "The statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). For Commerce to conclude that a respondent failed to cooperate to the best of its ability and to draw an adverse inference under 19 U.S.C. § 1677e(b), Commerce need only make two showings.

> First, it must make an objective showing that a reasonable and responsible [respondent] would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Id. at 1382–83 (internal citation omitted); *see also China Steel Corp. v. United States*, 28 CIT ___, ___, 306 F. Supp. 2d 1291, 1304 (2004).

The first requirement is easily satisfied. As the Court has held, "[t]here can . . . be no doubt that a reasonable and responsible producer, seeking an administrative review, will have accurate records of its factors of production." *Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT ___, ___, Slip Op. 03–135 at 36 (Oct. 22, 2003).

With regard to the second requirement, it is undisputed that TMC did not provide either packing materials for weighing[3] or records

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[3] TMC's failure to provide packing materials for weighing was due, at least in part, to the

documenting packing weights, even though Commerce expressly notified TMC in advance that packing materials and documentation would be required for verification. *See* Verification Agenda Outline for TMC, Def.'s App. at Ex. 3 at 10 (Apr. 9, 2002). TMC claims that it has never maintained records of packing weights, but rather, has always provided and verified packing data by weighing actual inventory. Plaintiffs' Reply Brief ("Pls.' Reply Br.") at 8. Thus, TMC asserts, short of weighing inventory, there is no way to verify packing weights. *See id.*

TMC's argument is unpersuasive. A respondent's failure to maintain required records is not an adequate defense to a determination by Commerce that the respondent failed to act to the best of its ability. The Court of Appeals for the Federal Circuit has clearly articulated that "the [best of ability] standard does not condone. . . inadequate record keeping." *Nippon Steel*, 337 F.3d at 1382. It assumes that respondents are familiar with the rules and regulations that apply, and requires respondents to "take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable [respondent] should anticipate being called upon to produce[.]" *Id.*

TMC has not adduced any evidence to suggest that maintaining packing records would be impossible, or even impracticable; rather, TMC merely asserts that its methodology does not involve maintaining packing records. TMC's assertion supports the subjective showing by Commerce that TMC's failure to respond fully is the result of its own lack of cooperation in failing to keep and maintain all required records. As such, the Court concludes that the second requirement for applying AFA is met.

Accordingly, the Court finds Commerce's conclusion that TMC failed to cooperate by not acting to the best of its ability, and its consequential decision to apply AFA to TMC's packing factor of production, to be supported by substantial evidence and otherwise in accordance with law.

B. Commerce's Decision to Apply Adverse Facts Available for Wooden Pallets to All of TMC's Hammers Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

TMC challenges Commerce's decision to apply AFA for wooden pal-

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fact that the factory selected for verification was closed and no longer had any inventory present. However, TMC conceded at oral argument that it could have furnished packing materials from another factory to be weighed as a substitute. *See* Oral Argument Tr. at 47 ("Could we have given packing material for a second factory . . . ? That is a possibility and, to my knowledge, that . . . option was never discussed."). In light of this admission, the Court is reluctant to conclude that TMC put forth its maximum effort in providing Commerce with materials for weighing. It is unnecessary for the Court to reach this issue, however, since TMC's failure to maintain records of packing weights is dispositive.

lets to all of TMC's hammers, regardless of whether they were made by the factory that failed verification. During the review, TMC reported that one of its factories did not use wooden pallets at all, while other factories only used wooden pallets for some hammers. *See* Heavy Forged Hand Tools from China – TMC Additional Response to the Department's December 6, 2001, Supplemental Questionnaire, Pls.' Conf. App. at Ex. 10 (Feb. 6, 2002). Moreover, TMC's sales documents (specifically, the bills of lading) indicate whether the hammers were placed on wooden pallets, metal pallets, or no pallets. *See* Sample Sales Traces TMC, *id.* at Ex. 9. Thus, TMC objects to Commerce's application of AFA to all hammers sold, regardless of whether they were shipped on pallets. *See* Pls.' Br. at 31–32. TMC asserts that even if Commerce was justified in applying AFA to its packing factor of production, Commerce erred in applying AFA to pallets for all of its hammer factories. *See id.* at 31.

TMC's argument attempts to distinguish pallets from the packing factor of production. Commerce's verification methodology, however, does not permit this distinction to be drawn. In fact, Commerce's methodology *includes* pallets in the packing factor of production, and does not contemplate using information from sales documents to verify packing factors. *See* Verification Agenda Outline for TMC, Def.'s App. at Ex. 3 at 10 (Apr. 9, 2002); Def.'s Br. at 34. As a result, TMC's argument hinges on the invalidity of Commerce's verification methodology.

The Court reviews Commerce's verification procedures for an abuse of discretion. *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1383–84 (Fed. Cir. 2001) (citing *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997)). While "all information relied upon in making . . . a final determination in a review" is required to be verified under 19 U.S.C. § 1677m(i)(1), the statute does not delineate the precise means for conducting verification. 19 U.S.C. § 1677m(i)(1) (1994). Rather, "[t]he decision to select a particular [verification] methodology rests solely within Commerce's sound discretion." *Hercules, Inc. v. United States*, 11 CIT 710, 726, 673 F. Supp. 454, 469 (1987). Moreover, in selecting its verification procedures, Commerce is given "wide latitude," *see Am. Alloys, Inc. v. United States*, 30 F.3d 1469, 1474 (Fed. Cir. 1994), and is owed "considerable deference" by the Court. *See Daewoo Electronics Co. v. United States*, 6 F.3d 1511, 1516 (Fed. Cir. 1993).

In the instant case, Commerce's decision not to use information contained in TMC's sales documents to verify TMC's packing factors is reasonable. The sales and cost portions of verification are conceptually distinct and are conducted for separate purposes. The sales portion is undertaken to verify sales information (such as the type of merchandise shipped, the port of loading, and shipper expenses) by examining sample bills of lading. The cost portion is conducted to

verify factor of production information (such as packing data) by visiting a preselected factory and either weighing actual packing materials or reviewing records of packing weights. Commerce's methodology does not contemplate using incidental information from sample sales documents to verify factor of production data. The Court finds nothing on the record to suggest that Commerce abused its discretion in this regard.

TMC's claim that pallets are distinct from the packing factor of production is also without merit. Commerce determined in advance that pallets would be verified as a packing factor of production, and expressly notified TMC of this fact prior to verification. *See* Verification Agenda Outline for TMC, Def.'s App. at Ex. 3 at 10 (Apr. 9, 2002). Moreover, since pallets are used to package the merchandise at issue, such a methodology is reasonable. "When Commerce applies a reasonable standard to verify materials submitted and the verification is supported by such relevant evidence as a reasonable mind might accept, the Court will not impose its own standard, superceding that of Commerce." *Hercules*, 11 CIT at 726, 673 F. Supp. at 469 (internal quotation omitted).

Accordingly, the Court holds that Commerce's decision to apply AFA to pallets is supported by substantial evidence and otherwise in accordance with law.

C. Commerce's Application of Adverse Facts Available in Calculating Huarong's Labor Rate Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

Huarong argues that Commerce improperly resorted to AFA in calculating its labor rate because Commerce did not demonstrate that Huarong failed to act to the best of its ability during the review. Pls.' Br. at 18. Huarong claims that it complied with Commerce's requests for information, and attributes the disparities observed during verification to errors on the part of Commerce in using the methodology supplied by Huarong to calculate labor production figures. *Id.* at 20. Specifically, Huarong contends that Commerce should have divided certain production figures by the number of team members. *Id.* at 25. In addition, Huarong asserts that Commerce did not provide it with an adequate opportunity to correct deficiencies in its submissions. *See id.* at 26.

Commerce contends that Huarong did not cooperate to the best of its ability in providing information regarding labor production rates. Def.'s Br. at 13–14. According to Commerce, Huarong's labor production computations proved incorrect, despite supplemental requests for information, and did not survive verification. *Id.* at 19. In addition, Huarong deemed erroneous and subsequently retracted the explanation for the discrepancy that it originally provided to Commerce. *Id.* at 22. Huarong ultimately attributed the discrepancy to Commerce's faulty application of the provided methodology, and sug-

gested a modification in the calculations. *Id.* at 20. Commerce contends that Huarong's belated effort at correction is improper, and further notes that the labor production rates proved inaccurate even using Huarong's post-verification methodology. *Id.* at 19–20.

The Court first examines whether Huarong, through its questionnaire responses, "create[d] an accurate record and provide[d] Commerce with the information requested[.]" *Reiner Brach GmbH & Co. KG v. United States*, 26 CIT ___, ___, 206 F. Supp. 2d 1323, 1333 (2002). Huarong's initial response to Commerce's request for information was inadequate, and Commerce provided Huarong with a supplemental questionnaire to clarify ambiguities in the information. *See* Huarong's Section D Response to Department's Supplemental Questionnaire, Def.'s App. at Ex. 2 (Jan. 15, 2002). Specifically, Huarong was asked to submit worksheets showing the calculation of its reported labor caps. *Id.* at 12. It responded with a formula multiplying the number of workers by number of hours worked and divided by number of pieces produced. *See id.* ("Based on years of experience, Huarong has worked out labor ratings which are close to the production records verified by the Department in prior reviews. For heat treatment, as an example, there are six (6) workers in one (1) shift, one (1) skilled and five (5) unskilled. Each shift processes 3430 pieces each work day, which is eight (8) hours."). The methodology set forth in Huarong's supplemental questionnaire response makes no mention of team production or division by number of team members. Thus, based on the information in the supplemental questionnaire response for the tenth review, Commerce did not have notice or reason to believe that it should divide labor figures by number of team members.

Huarong counters that Commerce verified its labor production figures in the ninth review, and therefore should have known to divide certain production figures by number of team members. Pls.' Br. at 25. Huarong, however, did not reference ninth review methodology in its responses to Commerce's questionnaires, and did not alert Commerce prior to verification that the calculations should include division by team members. In addition, as Commerce notes, it need only rely on information provided in a given review to arrive at its decision. *See Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 349, 966 F. Supp. 1230, 1238 (1997) (observing that each administrative review is a separate exercise of administrative procedure opening the possibility of different conclusions based on different facts accumulated). Commerce indicated in the *Preliminary Results* that it intended to rely exclusively on the formula provided by Huarong in the current review, noting that because past computations produced discrepancies and were not verified, it would not blindly incorporate past methods into the present calculations. *See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China, Preliminary Results and Preliminary*

Partial Rescission of Antidumping Duty Administrative Reviews, Notice of Intent Not To Revoke in Part and Extension of Final Results of Reviews, 67 Fed. Reg. 10123, 10126 (Mar. 6, 2002) ("*Preliminary Results*"). Thus, the Court finds that Commerce did not err in failing to divide certain production figures by number of team members.

Commerce subsequently conducted verification at Huarong's headquarters from May 27 through May 31, 2002. *See* Verification Report of Huarong, Def.'s App. at Ex. 8 (July 24, 2002). At verification, Commerce was unable to re-create or explain the method by which Huarong arrived at its labor production figures. Issues and Decision Memo at Cmt. 18. Commerce then afforded Huarong the opportunity to explain the discrepancy in production figures, which company officials attributed to an inflated estimate of labor time. *See* Verification Report of Huarong, Def.'s App. at Ex. 8 at 21–22 (July 24, 2002) ("Company officials explained that the difference between the labor in the production record and their reported figures was due to the fact that the workers did not necessarily work an entire 8 hours per shift. They stated that the use of an 8 hour shift would inflate the labor time for processes where laborers worked fewer hours. For example, after using Huarong's reported formula, it shows that it took [***] and [***] minutes to paint each piece for CONNUMU 5. However, company officials stated that it is unlikely that it took this much labor time to dip a CB or WB into paint. We asked officials to provide the correct amount of time for each shift. However, they could not provide an estimation of the time workers worked on each process for each shift.").

Two months later, Huarong retracted the explanation originally offered by its officials, replacing it with the contention that Commerce "erred . . . when it failed to include the number of workers in the denominator as well as the numerator for some of the[ ] calculations." Administrative Case Brief of Respondents, Def.'s App. at Ex. 9 at 23 (July 31, 2002). Commerce determined that this post-verification amendment to Huarong's reported methodology was inappropriate. Issues and Decision Memo at Cmt. 18. Accordingly, Commerce declined to accept the correction and recalculate Huarong's labor production figures. *See id.*

Agencies generally enjoy broad discretion in fashioning rules of administrative procedure, including the authority to establish and enforce time limits on the submission of data by interested parties. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 544–45 (1978). In accordance with this principle, Commerce has promulgated regulations setting forth deadlines for submitting factual information. Specifically, 19 C.F.R. § 351.301(b)(2) states that "factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed[.]" 19 C.F.R. § 351.301(b)(2). Moreover, 19 U.S.C.

§ 1677m(d) provides that "[i]f [a] person submits further information in response to [a] deficiency and . . . such response is not submitted within the applicable time limits, then [Commerce] may . . . disregard all or part of the original and subsequent responses." 19 U.S.C. § 1677m(d). Both the statute and the regulation underscore the breadth of Commerce's discretion in fashioning the temporal parameters of administrative proceedings, and force parties to submit information within a specified time frame in the interests of fairness and efficiency. *See Gulf States Tube Div. of Quanex Corp. v. United States*, 21 CIT 1013, 1040, 981 F. Supp. 630, 653 (1997) ("Commerce's policy of setting time limits on the submission of factual information is reasonable because Commerce clearly cannot complete its work unless it is able at some point to 'freeze' the record and make calculations and findings based on that fixed and certain body of information.") (internal quotation omitted).

The correction in this case was submitted two months after verification and approximately six weeks before Commerce issued the *Final Results*. As such, the correction was tendered at the last minute, and its acceptance or rejection was well within Commerce's discretion. *See* 19 U.S.C. § 1677m(d). Commerce did not abuse its discretion by disregarding Huarong's correction and declining to modify its calculations after so much time had elapsed since verification. *Id.*

Huarong suggests that the errors in its data were obvious and that Commerce should have alerted company officials of the incorrect calculations immediately. *See* Pls.' Reply Br. at 17–19. Huarong implies that it could have cooperated in a better and more timely fashion had Commerce informed it of readily observable and remediable errors in its data. *See id.* Commerce, however, is under no obligation to request or accept substantial new factual information from a respondent after discovering that a response cannot be corroborated during verification. *See Reiner Brach*, 26 CIT at ___, 206 F. Supp. 2d at 1334; *Bergerac, N.C. v. United States*, 24 CIT 525, 532, 102 F. Supp. 2d 497, 503–04 (2000). Verification is intended to test the accuracy of data already submitted, rather than to provide a respondent with an opportunity to submit a new response. *See Acciai Speciali Terni S.P.A. v. United States*, 25 CIT 245, 260–61, 142 F. Supp. 2d 969, 986 (2001) (citing *Certain Cut-to-Length Carbon Steel Plate from Sweden*, 62 Fed. Reg. 18396, 18401 (Apr. 15, 1997)); *see also* Verification Agenda Outline for Huarong, Def.'s App. at Ex. 4 at 2 (Apr. 9, 2002) ("[V]erification is not intended to be an opportunity for submitting new factual information. New information will be accepted at verification only when i) the need for that information was not previously evident, ii) the information makes minor corrections to the information already on the record, or iii) the information corroborates, supports, or clarifies information already on the record."). While Commerce is required to allow respondents to correct clerical errors discovered late in the administrative process, clerical errors are dis-

tinguished from substantive errors and do not encompass methodological modifications.[4] *See Torrington Co. v. United States*, 22 CIT 136, 137 (1998).[5]

The errors in Huarong's formula were neither self-evident nor the result of a clerical mistake. Rather, the errors were substantive in nature, and could be corrected only by modifying Huarong's original methodology. Commerce therefore was not required to alert Huarong of the errors or to accept substantive corrections post-verification.

Once Commerce identifies a discrepancy in the data submitted by a respondent, it must also find that the respondent failed to cooperate to the best of its ability for AFA to be warranted. *See* 19 U.S.C. § 1677e(b); *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). Commerce is not required to show intentional noncooperation to apply AFA; it need only demonstrate that the respondent did not put forth its maximum effort possible. *See Nippon Steel*, 337 F.3d at 1382–83 ("The ordinary meaning of 'best' means 'one's maximum effort,' as in 'do your best.' . . . While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element."). Although the standard does not demand perfection, it censures inattentiveness and carelessness. *Id.* at 1382. To draw an adverse inference, Commerce must show that the party did not behave in the manner of a reasonable and responsible respondent, and that it failed to put forth its maximum effort in investigating and obtaining the requested information. *Id.*

Commerce properly applied AFA in this case because Huarong had the ability to timely provide accurate and comprehensive labor production data and simply failed to do so. Commerce, in accordance with 19 U.S.C. § 1677m(d), alerted Huarong of deficiencies in its data by issuing a supplemental questionnaire requesting additional information. A reasonable respondent acting to the best of its ability would have ensured that the information set forth in its supplemental questionnaire response was comprehensive. In contrast, the information provided by Huarong in its supplemental questionnaire

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[4] Clerical errors result from inaccurate copying or duplication, or other similar unintentional errors. *See World Finer Foods, Inc. v. United States*, 24 CIT 541, 549–50 (2000).

[5] *See also Maui Pineapple Co. v. United States*, 27 CIT ____, ____, 264 F. Supp. 2d 1244, 1261 (2003) (citing *Certain Fresh Cut Flowers From Colombia*, 61 Fed. Reg. 42833, 42834 (Aug. 19, 1996), where Commerce stated that it will "accept corrections of clerical errors under the following conditions: (1) The error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) [Commerce] must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to [Commerce] no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the responses; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification").

response was incomplete and failed to mention methodological modifications for certain production processes. A reasonable respondent also would have promptly provided Commerce with a corrected formula upon Commerce's post-verification request. In contrast, Huarong waited two full months to provide Commerce with a revised formula incorporating a substantial methodological modification. In both of these respects, then, Huarong did not put forth its maximum effort; thus, Commerce's decision to apply AFA is warranted.

In drawing an adverse inference, Commerce must clearly articulate the manner in which a party failed to cooperate to the best of its ability, and why the missing information is significant to the progress of the proceeding. *See Borden, Inc. v. United States*, 22 CIT 233, 264, 4 F. Supp. 2d 1221, 1246 (1998). Commerce provided an adequate explanation of its decision to apply AFA in this case, citing its reliance on the methodology provided by Huarong, the verification failure, and Huarong's belated effort at correcting the requested data. *See* Issues and Decision Memo at Cmt. 18.

Accordingly, Commerce's decision to apply AFA in calculating Huarong's labor production rate is supported by substantial evidence and otherwise in accordance with law.

D. Because TMC Failed to Apply for a Scope Ruling Regarding Cast Iron Picks, TMC Did Not Exhaust Its Administrative Remedies.

Commerce decided that TMC failed to cooperate to the best of its ability by neglecting to report its U.S. sales of three cast iron picks. *See* Issues and Decision Memo at Cmt. 21. Specifically, Commerce determined that cast iron picks fall within the scope of the antidumping duty orders covering heavy forged hand tools, based on both the language of the orders and a 2001 scope ruling at TMC's behest with regard to Pulaski axes, which excluded production method from scope determinations. See Final Scope Ruling – Antidumping Duty Orders on Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China – Request by Tianjin Machinery I/E Corp. for a Ruling on Pulaski Tools, Public Appendix to Motion of Plaintiffs Tianjin Machinery Import & Export Corp. and Shandong Huarong General Group Corp. for Judgment on the Agency Record ("Pls.' Pub. App.") at Ex. 14 at 7 (Mar. 8, 2001) ("Pulaski Tools Final Scope Ruling"). As a result, Commerce applied AFA to derive the margin for TMC's unreported cast iron pick sales. Issues and Decision Memo at Cmt. 21. TMC counters that Commerce erred in applying AFA because the antidumping duty orders discuss forging as an exclusive, rather than illustrative, production method. *See* Pls.' Reply Br. at 21.

Under 19 C.F.R. § 351.225(b), a determination regarding the scope of an antidumping duty order can be initiated by Commerce or, under 19 C.F.R. § 351.225(c)(1), by the application of an interested

party. Thus, if a question arises as to whether certain merchandise is encompassed by an antidumping duty order, an interested party may request that Commerce issue a scope ruling to clarify the order's application to the merchandise in question.

In this case, it is unclear whether cast iron picks fall within the scope of the antidumping duty orders. The Pulaski Tools Final Scope Ruling referenced by both parties is ambiguous in its analysis of the antidumping duty orders, and it provides ambivalent guidance regarding the orders' applicability to cast iron picks. Moreover, given Commerce's exclusion of production method from scope determinations in the Pulaski Tools Final Scope Ruling, TMC should have hesitated to conclude that cast iron picks fall outside the scope of the antidumping duty orders because they are cast rather than forged. *See* Pulaski Tools Final Scope Ruling at 7. Instead, TMC should have requested a scope determination from Commerce to resolve the issue. It had an opportunity to do so when Commerce issued the *Preliminary Results* stating its intent to consider cast iron picks as falling within the purview of the antidumping duty orders. *See Preliminary Results*, 67 Fed. Reg. at 10123. However, TMC never applied for a scope ruling.[6]

Whenever warranted, the Court is obligated to require the exhaustion of administrative remedies before an issue may be properly addressed here. 28 U.S.C. § 2637(d). "The detailed scope determination procedures that Commerce has provided constitute precisely the kind of administrative remedy that must be exhausted before a party may litigate the validity of the administrative action." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599–600 (Fed. Cir. 1998).

Accordingly, because TMC failed to exhaust its administrative remedies, the Court declines to exercise jurisdiction to address whether Commerce properly applied AFA as a result of TMC's failure to report its cast iron pick sales.

E. Commerce's Decision to Use Indian Import Data for the Period Covering February through December 2000 as the Surrogate Value for the Handles on TMC's Hammers and Axes Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

During the period of review, TMC exported hammers and axes with wooden and fiberglass handles. Pls.' Br. at 32. In accordance with 19 U.S.C. § 1677b(c)(1), Commerce used Indian import data for the period covering February through December 2000 as the surrogate value for the handles.[7] *Id.* at 33; Def.'s Br. at 5. However, Com-

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[6] *See* Oral Argument Tr. at 30 ("[Y]ou're sitting at a verification and they now say you should have asked before for a scope ruling. And certainly, the issue had – it was not on our radar screen, to use that oft-used phrase. We – it never occurred to us. . . .").

[7] 19 U.S.C. § 1677b(c)(1) provides:

merce previously determined in a new shipper review for heavy forged hand tools that the same Indian import data for the period covering February through July 2000 was aberrational. *See Heavy Forged Hand Tools From the People's Republic of China: Final Results of New Shipper Administrative Review*, 66 Fed. Reg. 54503 (Oct. 29, 2001).

TMC asserts that Commerce should have also rejected as aberrational the February through July 2000 Indian import data used to value the handles on TMC's hammers and axes. Pls.' Br. at 34. At a minimum, TMC contends that Commerce should have explained how it determined that this data was aberrational in the new shipper review, but not in the present review. *Id.* at 33–34. TMC further claims that Commerce failed to evaluate the Indian data against the U.S. benchmark, and that had it done so, it would have realized the Indian data was aberrational. *Id.* at 32–33. TMC also points to Commerce's obligation under 19 U.S.C. § 1677b(c)(1) to select the "best available information" when valuing factors of production, arguing that Commerce did not show how the Indian import data, rather than Indonesian import data, was in fact the best available information. *See* Pls.' Reply Br. at 10–11.

The Court readily disposes of TMC's first line of argument by applying the doctrine of exhaustion of administrative remedies. As noted above, "[t]he doctrine . . . provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (quoting McKart v. United States, 395 U.S. 185, 193 (1969)) (internal quotation omitted). The exhaustion doctrine is "particularly pertinent" where, as here, "the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise." *McKart*, 395 U.S. at 194.

TMC did not raise its contention regarding differential treatment of the February through July 2000 Indian import data in its administrative case brief. *See* Administrative Case Brief of Respondents, Def.'s App. at Ex. 9 at 13–17 (July 31, 2002). Had TMC identified this issue during the administrative review, Commerce could have

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If--

(A) the subject merchandise is exported from a nonmarket economy country, and

(B) [Commerce] finds that available information does not permit the normal value of the subject merchandise to be determined . . . , [Commerce] shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise. . . . [T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce].

19 U.S.C. § 1677b(c)(1).

addressed it in the Issues and Decision Memo. By not raising its "argument with reasonable clarity and avail[ing Commerce] with an opportunity to address it[,]" *Timken Co. v. United States*, 25 CIT 939, 958, 166 F. Supp. 2d 608, 628 (2001), TMC failed to exhaust its administrative remedies. Therefore, the Court declines to exercise jurisdiction over this issue.

The Court turns next to TMC's claim that Commerce failed to evaluate the Indian data against the U.S. benchmark. Contrary to TMC's contention, Commerce did make such a comparison. Indeed, Commerce considered but ultimately rejected Indian import data for January 2001, explaining that "[t]he Department has excluded from the Indian import data the month of January 2001, which has a monthly value that is high enough *in relation to the U.S. benchmark* and the rest of the Indian data to be considered aberrational." Issues and Decision Memo at Cmt. 7 (emphasis added). Accordingly, the Court finds TMC's assertion to be unfounded.

TMC's argument that Commerce did not show how the Indian import data, rather than Indonesian import data, was the "best available information" is also unavailing. Commerce values the factors of production in a nonmarket economy country "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1). "While the statute does not define 'best available information,' it grants to Commerce broad discretion to determine the best available information in a reasonable manner on a case-by-case basis." *Anshan Iron & Steel Co. v. United States*, 27 CIT ___, ___, Slip Op. 03–83 at 7 (July 16, 2003) (quoting *Timken*, 25 CIT at 944, 166 F. Supp. 2d at 616) (internal quotation omitted). In fact, "Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was a reasonable way." *Coalition for the Pres. of Am. Brake Drum & Rotor Aftermarket Manufacturers v. United States*, 23 CIT 88, 118, 44 F. Supp. 2d 229, 258 (1999).

The record shows that Commerce's decision to use Indian data was well within Commerce's broad discretion. Commerce determined that the average unit value of 289.06 rupees per kilogram (US $6.38 per kilogram) for Indian imports during the eleven-month period was sufficiently viable to be used as a surrogate value. Response of Defendant-Intervenor to Motion by Plaintiffs for Judgment on the Agency Record ("Def.-Intvr.'s Br.") at 25; *see also* Pls.' Br. at 34; Def.'s Br. at 40. While the Indian value was higher than the 2000 benchmark Indonesian unit value proffered by TMC, the Indian value was substantially lower than the 1999 Indonesian unit price of $11.168 per kilogram. Def.-Intvr.'s Br. at 25. Given the fluctuations in market prices and the wide variations in benchmark prices, the Court

finds that the Indian data was a reasonable and appropriate surrogate value.

Accordingly, Commerce's use of Indian import data for the period covering February through December 2000 as the surrogate value for handles is supported by substantial evidence and otherwise in accordance with law.

F. Commerce's Fifteen-Day Liquidation Policy Is Not in Accordance with Law.

Shortly before issuing the *Final Results*, Commerce posted a notice on its website announcing its implementation of a new liquidation policy. The notice states that Commerce intends to issue liquidation instructions to Customs "within 15 days of publication of the final results of review in the *Federal Register* or any amendments thereto." Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Administrative Reviews, Pls.' Pub. App. at Ex. 13 (Aug. 9, 2002).

Plaintiffs challenge this new liquidation policy on the grounds that it conflicts with the sixty-day period set forth in USCIT Rule 3(a)(2) for perfecting an appeal. Pls.' Br. at 35. Plaintiffs further contend that the new policy will result in a flood of preliminary injunction motions before the Court by parties seeking to stay liquidation and preserve the Court's jurisdiction. *See id.*

Commerce posits that the new policy is in accordance with law because nothing in Rule 3(a)(2) prohibits a party from filing its summons and complaint together within fifteen days after publication of the final results. Def.'s Br. at 42–43. Commerce also asserts that in light of the Federal Circuit's determination in *International Trading Co. v. United States* that entries not liquidated within six months of the publication of final results are deemed liquidated at the cash deposit rate, it would be administratively unwise for Commerce to wait sixty days before sending liquidation instructions to Customs. *Id.* at 43.

Rule 3(a)(2) implements the statutory directive of 19 U.S.C. § 1516a(2)(A) that an interested party may challenge an administrative determination by filing a summons within thirty days of the date of publication of the final results in the Federal Register, and by subsequently filing a complaint within thirty days thereafter. 19 U.S.C. § 1516a(2)(A). On its face, then, § 1516a(2)(A) allows a plaintiff to *wait* thirty days before filing its summons, and to *wait* an additional thirty days before filing its complaint. The fact that a party *could* file both its summons and complaint within fifteen days is immaterial. Because Commerce's fifteen-day liquidation policy directly contravenes the time frame established by § 1516a(2)(A) for filing a summons and a complaint, the Court finds that Commerce's new

policy is not in accordance with law.[8]

Moreover, the Court is concerned that Commerce's new policy will compel parties, in every instance, to seek a preliminary injunction within fifteen days to prevent liquidation and preserve the Court's jurisdiction, regardless of whether the party ultimately decides to challenge any aspects of the final determination. As a result, in addition to imposing financial burdens on litigants in the form of increased attorney's fees and court costs, the policy will also impose a substantial burden on the Court by inundating it with preliminary injunction motions.

Although Commerce contends that it would be administratively unwise to wait sixty days before issuing liquidation instructions, the rationale offered by Commerce at oral argument to support this assertion is wholly insufficient. Commerce's entire argument is as follows:

> [I]t does take a while for Commerce to issue the instructions, for those instructions to make it to the ports at Customs, and then for the individual Port Directors to actually liquidate those entries. It's a time-consuming process that takes double-checking and double-checking to make sure that there are no inadvertent liquidations.

Oral Argument Tr. at 72. Commerce's argument is conveniently vague and entirely fails to address exactly how "time-consuming" the liquidation process is. As a result, the Court finds that Commerce has not adequately explained how it would be administratively unwise to wait sixty days, instead of fifteen, before issuing liquidation instructions.

Accordingly, the Court holds that Commerce's fifteen-day liquidation policy is not in accordance with law.

III. *CONCLUSION*

For the aforementioned reasons, the Court sustains the *Final Results*, but finds that Commerce's fifteen-day liquidation policy is not in accordance with law. Judgment will be entered accordingly.

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[8] Commerce argues that Plaintiffs do not have standing because they waited eighteen days (instead of fifteen) to file their summons and complaint. *See* Def.'s Br. at 45. The Court disagrees. 19 U.S.C. § 1516a(2)(A) permits parties to wait thirty days before filing their summons, and an additional thirty days before filing their complaint. However, because of Commerce's new liquidation policy, Plaintiffs felt compelled to file their summons and complaint within eighteen days. Plaintiffs were injured to the extent that Commerce's new policy required them to file their summons and complaint prematurely; the fact that Plaintiffs waited for eighteen days instead of fifteen is beside the point. Thus, Plaintiffs do have standing to challenge Commerce's new liquidation policy.

Slip Op. 04–126

BEFORE: GREGORY W. CARMAN

FORMER EMPLOYEES OF GETRONICS WANG CO., LLC Plaintiffs, v. ELAINE L. CHAO, UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 03–00529

JUDGMENT ORDER

Upon consideration of the United States Department of Labor's determination in *Getronics Wang Company, LLC, Valley View, OH; Notice of Revised Determination on Remand*, 69 Fed. Reg. 20,643 (April 16, 2004), issued in response to this Court's order of March 31, 2004, *Former Employees of Getronics Wang Co., LLC v. Chao*, No. 03–00529 (Ct. Int'l Trade March 31, 2004) (order granting voluntary remand), Plaintiffs' letter to Court dated September 27, 2004, advising this Court that Plaintiffs accepted Department of Labor's remand determination and settlement documents have been signed, and all other pertinent papers, it is hereby

ORDERED that the Department of Labor's determination is affirmed; and it is further

ORDERED that all issues before the Court having been resolved, this case is dismissed.

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